Supreme Court, U.S.
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In The

Supreme Court of the United States

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BRIAN STINSON,

Petitioner,

vs.

DIANA BUTLER, WARDEN,

Respondent.

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On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") which require federal courts to give deference to state court findings, apply to state court findings that are *favorable* to federal habeas petitioners, and not just findings that are unfavorable, as the district court ruled?

2. Whether the Ninth Circuit misinterpreted clearly established federal law, as determined by the Supreme Court of the United States, that jurors are prohibited from considering extrinsic evidence (i.e., evidence not admitted at trial) when it reversed the district court's grant of habeas relief on the ground that the state court's denial of habeas relief was not an unreasonable application of federal law?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Petitioner is serving a life sentence at the Old Folsom State Prison in Represa, California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Stinson respectfully prays that a writ of certiorari issue to review the June 25, 2003, memorandum decision of the Ninth Circuit Court of Appeals reversing the district court's conditional grant of habeas corpus relief.

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OPINION BELOW

The opinion of the Ninth Circuit is unpublished and a copy is attached as Appendix A. The August 19, 2003, order denying the petition for rehearing and rejecting the suggestion for rehearing en banc is attached as Appendix D.

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JURISDICTION

The opinion was filed on June 25, 2003. (Appendix A.) The petition for rehearing was denied on August 19, 2003. (Appendix D.) The petition for writ of certiorari is due for filing on November 17, 2003. Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

28 U.S.C. § 2254(d):

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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STATEMENT OF THE CASE

I. Introduction

Daryl Smith died of stab wounds inflicted during what started as a fight with petitioner Brian Stinson and turned into a general melee during a raucous bachelor party. Petitioner was charged with having intentionally killed Smith with premeditation and malice aforethought. Petitioner admitted stabbing Smith, but maintained he acted in fear of his own life and was, at most, guilty of manslaughter, not first or second degree murder.

During deliberations, a juror opined a facial cut suffered by Smith during an earlier encounter with Petitioner was caused by the butt of a knife, and not by a fist. The basis for the juror's opinion was not the evidence presented during the trial, but what she claimed was her purported experience and expertise as an emergency room nurse.

The state court of appeal ruled that the juror's purported expert opinion constituted extrinsic evidence, and that she committed misconduct by expressing it during deliberations. The state court, however, denied relief on the ground that the misconduct was harmless error.

The federal district court deferred to the state court's finding the juror's purported expert opinion was extrinsic evidence and constituted jury misconduct. In an exhaustive and detailed opinion, the district court explained that the state court's ruling that the error was harmless was an unreasonable application of the facts to the law. Specifically, the district court explained that the state court's harmless error ruling was based on its mistaken belief that petitioner admitted that he knew Daryl Smith was unarmed.

The Ninth Circuit reversed the grant of habeas relief, not on the ground that the jury misconduct was harmless, but on the ground that no misconduct occurred. The panel failed completely to give any deference to the state court's ruling finding misconduct, nor did it give any reason as to why it was not required to give deference to the state court's ruling, as mandated by 28 U.S.C. § 2254(d).

This petition for writ of certiorari should be granted because the Ninth Circuit's decision reversing the district court's grant of habeas relief, involves an important question of federal law that has not been, but should be, decided by this Court. That is, under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") whether and when the federal court must defer to state court decisions that are favorable to the habeas petitioners is an important undecided federal question. Supreme Court Rule 10(c). The memorandum also conflicts with clearly established authority of this Court. Supreme Court Rule 10(c); § 2254(d)(1).

II. Relevant Facts

A. The Offense

In 1995, petitioner was convicted of second degree murder after getting into a fight with Daryl Smith at a rowdy bachelor party where guests consumed large quantities of alcohol and were entertained by strippers. Several guests carried knives, including petitioner. Early in the evening, Daryl Smith, who had been drinking, picked up two dollar bills that petitioner had dropped on the floor for Bob Pinckard, the guest of honor, to put on a stripper. Petitioner told Smith to give the money to Pinckard. Smith cursed at petitioner and threw a punch and the two began fighting. Other guests separated the two and petitioner apologized. Smith was upset and said that petitioner had hit him. Smith's left eye was swollen and red. The uncontroverted evidence was that the first encounter was a fist fight.

Smith reluctantly shook petitioner's hand. Smith's friends continued egging him on. Smith's brother said, "don't let him get away with it." (Report at 6-8, ER 929-931.) Later that evening Smith told others that petitioner was the person he had fought with. Smith whistled at petitioner twice before the two began fighting again. At that point there was "chaos" and "pandemonium." People were piled on top of each other, cursing, screaming, and fighting. After Smith was pulled from the bottom of the pile he was bleeding. Some called the police while others took Smith to the kitchen.

Smith died from massive blood loss due to ten knife wounds he had sustained in the chest, arms, and back, and buttocks. When petitioner heard that Smith had died, he turned himself in. He told police he thought he might have stabbed Smith twice. The coroner testified that it was not possible to tell whether petitioner's knife caused all of Smith's wounds.

Petitioner testified that he had carried a knife for protection. During the first fight he and Smith punched each other. Just before the second fight, petitioner had become scared when he heard whistling, yelling, and people running behind him. Petitioner was struck from behind and turned to see Smith's fist coming at him. He took his own knife out hoping to scare Smith off but Smith kept coming at him. He did not see Smith carrying a weapon. Petitioner stabbed Smith twice before they both fell to the ground with Smith on top of him. He was holding the knife while they rolled around and other people kicked him. He was pinned to the ground and did not stab Smith in the buttocks or the back. When Bob Pinckard pulled Smith off of him he got up and left. When he learned that Smith had died he called his grandmother so he could turn himself in.

B. The State Court of Appeal Held That There Was Jury Misconduct but Found it Was Not Prejudicial

Petitioner's trial lawyer unsuccessfully filed a new trial motion on numerous grounds of jury misconduct. On appeal, petitioner argued that he had been denied his constitutional rights when the jury committed prejudicial misconduct. The state court of appeal held that two jurors committed misconduct but that none of it was prejudicial. One juror who was a nurse, told the others during deliberations that she believed, based on her work related experience, that the cut on Smith's eye had to have come from a knife and not a fist.

> "Evidence obtained by jurors from sources other than in court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby . . . jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court." (Slip opn. at p. 9, Appendix C.)

> Lloyd Z. Told the investigator that a juror, whom he believed was a woman, pointed out to other jurors that the cut above the victim's eye, received in the first fight, could have been made by a knife held in the hand when the blow was delivered. The juror pointing this out said she had been an emergency room nurse. 'She explained

that the cut could have been made when the defendant's clenched fist first made contact with the victim's face, while holding the knife, with the blade of the knife sticking up between his thumb and forefinger, and the butt of the knife protruding from the bottom of the hand . . . She told the rest of the jury that the cut was 'too clean' to be a cut from the defendant's fist, but believed that this was a cut resulting from the butt of the knife striking the victim's face.' Don T. also told the investigator that one juror 'did bring up the fact that she believed the knife was in the defendant's hand during the first fight because of the cut on the victim's head." (Slip opn. at pp. 10-11, Appendix C.)

"Joan G. Declares that one juror, a nurse by profession, explained that the cut near the victim's eye could not have been made by a fist. She said she had seen cuts and bruises in the past as a nurse. In her opinion, this cut was made by the butt of the knife making contact with the eye area. In addition, this juror gave a medical explanation of how the victim's knife wounds could have been made by defendant's knife. This explanation went beyond the coroner's testimony." (Slip opn. at p. 11, Appendix C.)

"The victim received the black eye and the cut above his eye in the first fight he had with the defendant. If the cut necessarily was caused by a knife, then it may be inferred that he had his knife in his hand during the first fight. The question remains whether that inference is prejudicial to defendant.

"The second fight occurred 45 minutes or more after the first fight. Defendant admitted he stabbed the victim repeatedly, aiming for the

> chest area. He admitted he knew the victim was unarmed. With those admissions, self-defense and imperfect self-defense fly right out the window – even if the victim was the aggressor. With those claims demolished, the least offense of which defendant could have been convicted is the one of which he was convicted, second degree murder. Under an objective standard, a conclusion that he had the knife ready in his hand during the first fight could not have affected the outcome of the case. **The misconduct was not prejudicial.**" (Slip opn. at p. 11, Appendix C, emphasis added.)

C. The District Court Found That the Misconduct Was Prejudicial as the State Court Had Misread the Trial Record

After an evidentiary hearing, the district court found that the state court of appeal reasonably found that juror Sandra Williams committed misconduct. However, it did not reasonably find that the misconduct was harmless error because the court made clear factual errors regarding Petitioner's testimony:

> "The California Court of Appeal reasonably applied clearly established federal law when it found jury misconduct in each instance petitioner alleged. With the exception of the introduction of extrinsic evidence that a knife butt caused the injury to the victim's face, the Court of Appeal's finding of no prejudice was also a reasonable application of federal law.
>
> "However, as discussed below, after thorough review of the record and the applicable federal law, the undersigned Magistrate Judge finds that the

introduction and consideration by the jury of extrinsic evidence which was directly related to petitioner's asserted defenses (defenses on which jury instructions were given) had a substantial and injurious effect or influence on determining the jury's verdict.

"Because the state court's decision resulted in a finding that the jury misconduct was harmless, the state court erred. Moreover, the state court decision was the result of an 'unreasonable application' of Supreme Court law. 28 U.S.C. § 2254(d)(1). This court's 'firm conviction' that the state court was wrong is based on finding two errors in the state court's analysis. The trial record provides clear and convincing evidence that the California Court of Appeal made an unreasonable determination of the facts when it concluded that petitioner 'admitted that he knew' that the victim was unarmed. 28 U.S.C. § 2254(d)(2). Relying on this factual error, the Court of Appeal ignored trial evidence in support of petitioner's self defense theories, rendering its prejudice analysis clearly erroneous. Furthermore, this court finds that the jury misconduct had a 'substantial and injurious effect or influence' on determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 641." (Amended Report at 49-50, Appendix B.)

"The record reveals that juror Williams did not draw the conclusion that a knife butt caused the victim's facial injury based on the evidence. Instead, her conclusion was based solely upon her personal experience and purported expertise as an emergency room nurse. There was no evidence presented on the specific issue of whether a knife-butt caused the abrasion to Daryl Smith's face. Nor did the prosecution present evidence or argument to suggest that there was any question with respect to the cause of Daryl Smith's facial injury." (Amended Report at 57, Appendix B.)

"Here, juror Williams' 'emphatically' asserted her medical opinion that the injury on the victim's face was 'too clean' to be a cut from a fist, and she believed that it was caused by the butt of a knife. At petitioner's trial, other than stating that a photograph reflected that Daryl Smith had an abrasion and contusion over his left eye, the coroner did not testify regarding the injuries to the victim's face. None of the witnesses testified to having seen a knife during the first fight. Nor was there any specific testimony as to whether the injury to Daryl's face was caused by a knife-butt. The only record evidence consisted of general testimony regarding punches being thrown during the first fight." (Amended Report at 59, Appendix B.)

"The Court of Appeal found that petitioner 'admitted he knew the victim was unarmed. However, review of the record reveals that petitioner *never admitted knowledge* that Daryl Smith was unarmed. Petitioner testified that even though he did not see a weapon in Daryl Smith's hands, petitioner purportedly believed he was in imminent danger of great bodily injury or death because Daryl Smith was charging at him and he believed that Daryl's friends, who had displayed knives earlier in the evening, were attacking him as well. Petitioner was never asked whether he *believed* or *knew* whether Daryl was unarmed. Therefore, the record provides clear and convincing evidence that the California Court of Appeal's factual determination was unreasonable. 28 U.S.C. §§ 2254(d)(2) and (e)(1)." (Amended Report at 67-68, Appendix B, emphasis in the original, further citations omitted).

D. The Ninth Circuit Overlooked the Fact that the State Court of Appeal Agreed with the District Court that the Juror Violated the Extrinsic Evidence Rule

In reversing the district court's grant of habeas relief, the Ninth Circuit did not mention that the state court of appeal held that the juror committed misconduct. The Ninth Circuit's analysis is as follows:

> "We must '[a]s a threshold matter . . . first decide what constitutes' clearly estalbished Federal law, as determined by the Supreme Court." *Lockyer v. Andrade*, 123 S.Ct. 1166, 1172 (2003) (quoting § 2254(d)(1)). Clearly established Federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Id.* Here, the clearly established Federal law – correctly cited by the District Court – was set forth by the Supreme Court in *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); a defendant's conviction must be based on the evidence presented during the trial.
>
> "The district court granted habeas relief, in part, because it concluded that a disputed item of 'evidence' viz, the 'knife-butt theory' advanced by a juror who was an emergency room nurse – was extrinsic. We disagree. The 'evidence' in question was not extrinsic, but was based on the juror's belief expressed during deliberations concerning what a photograph admitted into evidence of the victim's injured face actually showed with regard to a particular weapon was used by the defendant during the first of two fights. *See United States v. Navarro-Garcia*, 926 F.2d 818, 821-22 (9th Cir. 1991). Whatever 'problem' that may

> have arisen during jury deliberations could have been handled through voir dire focusing on the juror's training and experience. *See Hard v. Burlington N.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989). Therefore, habeas relief must be denied." (Mem. Dec. at 2-3, Appendix A.)

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REASONS FOR GRANTING THE WRIT

III. The Federal Court Is Required to Defer to State Court Rulings That Are Favorable to Habeas Petitioners

In explaining 28 U.S.C. § 2254(d)(1) and (2), this Court held:

> "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court on a set of materially indistinguishable facts. Under the 'reasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

Williams (Terry) v. Taylor, 529 U.S. 362, 405 (2000).

In order for a federal court to find a state court's application of United States Supreme Court precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. The state court's application must have been "objectively unreasonable." *Wiggins v. Smith*, ____ U.S. __, 123 S.Ct. 2527, 156 L.Ed.2d 471, 2003 U.S. LEXIS 5014 [*20] (2003) citing *Lockyer v. Andrade*, 538 U.S. 63 (2003).

There is nothing in § 2254(d)(1) and/or (2) that requires the federal court to give deference only to state court decisions that are unfavorable to habeas petitioners and permits it to ignore or overlook the state court decision that is favorable to the petitioner. Due process has long required that criminal defendants be allowed to take equal advantage of the rules that benefit prosecutors. For example, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court extended the Compulsory Process Clause to the states via the Fourteenth Amendment when a state criminal defendant was not allowed to call a co-defendant to testify in his behalf.

> "This is . . . a case in which the state has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by defendant. This, I think, the Due Process Clause forbids." *Id.* at 25.

In *Wardius v. Oregon*, 412 U.S. 470 (1973), this Court held that a state may not require a defendant to give notice of an alibi without reciprocal discovery rights. "Due process" is "designed to enhance the truth" and "speaks to the balance of forces between the accused and his accuser." *Id.* at 474.

Here, the district court determined that the state court decision finding juror misconduct was not an unreasonable determination of clearly established Federal law. In reversing the district court's grant of habeas relief, the Ninth Circuit disagreed that the extrinsic evidence rule had been violated, but did not discuss the state court's contrary ruling on this point. This appears to be a case of first impression. However, given this Court's longstanding rule that due process "speaks to the balance of forces between the accused and his accuser," *Wardius v. Oregon*, 412 U.S. at 474, certiorari should be granted to decide when and whether state court decisions that are favorable to petitioners must be deferred to.

IV. The Ninth Circuit Has Also Misinterpreted the Extrinsic Evidence Rule

In disagreeing with the state court that the emergency room nurse committed misconduct, but rather "expressed" her "belief," the Ninth Circuit cited *United States v. Navarro-Garcia*, 926 F.2d 818, 821-22 (9th Cir. 1991). However, *Navarro-Garcia* does not stand for the proposition that jurors may express their beliefs during jury deliberations when those beliefs are held out as expertise that an ordinary person would not possess.

In *United States v. Navarro-Garcia*, 926 F.2d at 821 the Ninth Circuit noted that

> "a juror's past personal experiences may be an appropriate part of the jury's deliberations. Inevitably, 'jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict.' (Citing *Hard v. Burlington No. RR*, 812 F.2d 482, 486 (9th Cir. 1987). Indeed, '50% of the jurors' time is spent discussing personal experiences.' Kessler, 'The Social Psychology of Jury Deliberations,' in the Jury System in America 69, 83 ®. Simon ed. 1975). Nevertheless, in some instances a juror's personal experiences may constitute *extrinsic evidence*. This is the case when the juror has a personal knowledge regarding the parties or the issues involved in the

> litigation that might affect the verdict. See *Hard*, 812 F.2d at 486 (involving a juror who was allegedly a former employee of the defendant railroad, and who allegedly had personal knowledge of the railroad's settlement practices). *It is also the case if the jury considers a juror's past personal experiences in the absence of any record evidence on a given fact, as personal experiences are only relevant for purposes of interpreting the record evidence.*' (Citing *United States v. Jones*, 580 F.2d 219, 222 (6th Cir. 1978)."

United States v. Navarro-Garcia, 926 F.2d at 821-822 (emphasis added).

In a footnote, *Navarro-Garcia*, went on to state:

> "So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While *they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced*, they may, and to act intelligently they must, judge the weight and force of that evidence by *their own general knowledge of the subject* of inquiry."

Narvarro-Garcia, 926 F.2d at 822, n.2, quoting *Head v. Hargrave*, 105 U.S. 45, 49, 26 L.Ed 1028 (1881) (emphasis added).

In *Head v. Hargrave*, 105 U.S. 45, the plaintiff attorneys sought to recover $2,000 owed them for professional services. The judge instructed the jury that to determine the value of the attorneys' services the jurors were required to rely on the expert testimony and "not" on "your own knowledge or ideas as to the value of such services." *Id.* at 48. This Court found this instruction to be erroneous.

> "If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damage sustained, *they should ignore their own knowledge and experience of the value of a sound limb*. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in light of *their own general knowledge*; they should control only as they are found to be reasonable."

Head v. Hargrave, 105 U.S. at 49-50 (emphasis added).

Unbeknownst to petitioner, juror Williams did not rely on general knowledge shared by the average juror, but rather held herself out as an *expert witness;* an expert witness that petitioner did not have the opportunity to confront and cross-examine. *Turner v. Louisiana*, 379 U.S. 466. As the state court of appeal held jurors must be willing to lay aside their unique personal experiences and base their decisions solely on evidence that is presented in the courtroom. (Slip opn. at p. 9, Appendix C.) In this case, there was no evidence presented that the wound on Daryl Smith's eye was caused by a knife and there was no evidence presented that anyone wielded a knife during the first fight. The state court of appeal correctly determined that juror Williams committed misconduct based on clearly established Supreme Court authority.

The Ninth Circuit also rendered a decision contrary to Ninth Circuit caselaw. In *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998) a 2254 habeas corpus petition was granted after the Ninth Circuit found that a prospective juror tainted the entire panel by demonstrating her bias against the defendant during voir dire. The defendant was on trial for sexual conduct with a minor under the age of 14. The juror was a State of Arizona social worker who said that she would have a difficult time being impartial because of her line of work. She said that sexual assault had been confirmed in every case in which one of her clients reported such an assault. She also held herself out to be an expert in sexual assault matters, due to her own educational background and her work with psychologists and psychiatrists in this area. The juror was examined about her admitted bias extensively in front of the entire venire panel. The defense attorney moved for a mistrial arguing that the entire panel was tainted by the court's questioning of the juror. The trial court struck this juror for cause but denied the motion for a mistrial. *Id.* at 633.

The Ninth Circuit held that the trial court should have, "at a minimum," conducted further voir dire to determine whether the panel had in fact been infected by the juror's "expert-like statements." *Id.* at 633. The court presumed that at least one juror was tainted during deliberations by the voir dire of the biased juror. "This bias violated Mach's right to an impartial jury." *Ibid.*

What is significant is that in *Mach v. Stewart*, the Ninth Circuit not only characterized the social worker's answers on voir dire as "expert-like" it also characterized them as "extrinsic evidence" that was "highly inflammatory and directly connected to Mach's guilt." *Id.* at 634.

By contrast in the instant case, juror Williams' voir dire did not reveal that she would later rely on her own personal working experience to render a decision (and/or influence the rest of the jury with her purported expertise) when there was no evidence presented in the courtroom on the issue at hand. Nor did voir dire reveal her to be an "expert" in determining whether a wound was made by a knife or a fist, as she held herself out to the rest of the jurors during deliberations.

This case presents this Court with the perfect opportunity to decide whether and when the federal courts must defer to decisions of the state courts that are favorable to habeas petitioners. The district court deferred to the favorable portion of the state appellate court's ruling because it was an objectively reasonable interpretation of clearly established federal law. By contrast, the Ninth Circuit not only failed to defer to the state court's ruling, but rendered a decision that was contrary to clearly established federal law. In order to provide the lower Courts with much needed guidance in this important area of law, the petition for writ of certiorari should be granted.

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CONCLUSION

For the reasons expressed above, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: December 15, 2003

Respectfully submitted,

VERNA WEFALD
Counsel for Petitioner

APPENDIX A

Opinion filed June 25, 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN STINSON, Petitioner-Appellee, v. DIANA BUTLER, Warden Respondent-Appellant.	No. 02-56193 D.C. No. CV-98-10546-FMC MEMORANDUM* (Filed Jun. 25, 2003)

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted April 9, 2003
Pasadena, California

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

Warden Diana Butler ("the State") appeals the District Court's conditional grant of defendant/petitioner Brian Stinson's 28 U.S.C. § 2254 habeas petition challenging his conviction for second degree murder. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse.

Stinson filed his habeas petition in 1998; thus, the Antiterrorism and Effective Death Penalty Act of 1996

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

("AEDPA") governs our review. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the limited review provided by AEDPA, federal courts can grant habeas relief to state prisoners only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[1] or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d). See *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000).

We must "[a]s a threshold matter . . . first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court.'" *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003) (quoting § 2254(d)(1)). Clearly established Federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Id.* Here, the clearly established Federal law – correctly cited by the District Court – was set forth by the Supreme Court in *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965): a defendant's conviction must be based on the evidence presented during the trial.

The district court granted habeas relief, in part, because it concluded that a disputed item of "evidence" –

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[1] In determining whether a state court decision is contrary to or an unreasonable application of clearly established Federal law, this court examines the state's last reasoned decision – in this case, the unpublished opinion of the California Court of Appeal – as the basis of the state court's judgment. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).

viz, the "knife-butt theory" advanced by a juror who was an emergency room nurse – was extrinsic. We disagree. The "evidence" in question was not extrinsic, but was based on the juror's belief expressed during deliberations concerning what a photograph admitted into evidence of the victim's injured face actually showed with regard to whether a particular weapon was used by the defendant during the first of two fights. *See United States v. Navarro-Garcia*, 926 F.2d 818, 821-22 (9th Cir. 1991). Whatever "problem" that may have arisen during jury deliberations could have been handled through voir dire focusing on the juror's training and experience. *See Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989). Therefore, habeas relief must be denied. Accordingly, we REVERSE the district court's conditional grant of habeas relief.

REVERSED.

APPENDIX B

Judgment filed June 10, 2002; Order
Adopting Amended Report and
Recommendation of United States
Magistrate Judge filed June 10, 2003;
Amended Report and Recommendation of
United States Magistrate Judge filed March 15, 2002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF
CALIFORNIA-WESTERN DIVISION

BRIAN STINSON, Petitioner, v. ROSIE GARCIA (Warden) et al., Respondent.	)	CV 98-10546-FMC (SH) JUDGMENT (Filed Jun. 10, 2002)

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is conditionally GRANTED.

DATED: June 10, 2002

/s/ Florence Marie Cooper
FLORENCE MARIE COOPER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA-WESTERN DIVISION

BRIAN STINSON, Petitioner, v. ROSIE GARCIA (Warden) et al., Respondent.	CV 98-10546-FMC (SH) ORDER ADOPTING AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jun. 10, 2002)

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Amended Report and Recommendation of the United States Magistrate Judge, and has made a *de novo* determination of the Amended Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is conditionally GRANTED. Respondent shall release petitioner from custody, and discharge him from all other adverse consequences of his conviction in state court case number KA021224, unless the State of California elects to retry petitioner within a reasonable period of time.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Amended Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 10, 2002

/s/ Florence Marie Cooper
FLORENCE MARIE COOPER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF
CALIFORNIA – WESTERN DIVISION

BRIAN STINSON, Petitioner, v. ROSIE GARCIA (Warden) et al., Respondents.	No. CV 98-10546-FMC (SH) AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 15, 2002)

The Amended Report and Recommendation is submitted to United States District Judge Florence Marie Cooper, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. Petitioner's Petition should be granted and a conditional writ of habeas corpus should issue.

I. PROCEDURAL BACKGROUND

Petitioner Brian Stinson, a prisoner in the custody of the California Department of Corrections, challenges his conviction in Los Angeles County Superior Court (Case No. KA021224).

On September 22, 1994, a jury convicted petitioner of murder in the second degree (Cal. Penal Code § 187(a)). [Respondents' Motion to Dismiss ("MTD"), Ex. A.] The jury further found true the special allegation that petitioner used a deadly and dangerous weapon in the commission of the offense (Cal. Penal Code § 12022(b)). [*Id.*] On March 9, 1995, the trial court sentenced petitioner to state prison for fifteen-years-to-life, with the possibility of parole. [*Id.*]

Petitioner appealed his conviction to the California Court of Appeal, Second Appellate District, Division One. [MTD, Ex. B.] On September 30, 1996, the Court of Appeal issued an opinion affirming petitioner's conviction. [MTD, Ex. E.] Petitioner filed a petition for review in the California Supreme Court (Case No. SO57103). [MTD, Ex. F.] The California Supreme Court summarily denied this petition on January 15, 1997. [MTD, Ex. G.] Petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. SO66746) on December 23, 1997, which petition was denied on December 22, 1998. [MTD, Ex. K.]

Petitioner filed the instant Petition for Writ of Habeas Corpus ("Pet.") on December 30, 1998. Respondent filed a Motion to Dismiss ("MTD") on March 26, 1999. After that motion was denied, respondent filed her Return ("Ret.") on December 3, 1999, and lodged the Reporter's Transcript ("RT") and Clerk's Transcript ("CT") on the same date. Petitioner filed his Traverse ("Trav.") on March 2, 2000.

On July 24, 2000, after receiving briefing from the parties on the issue, the undersigned Magistrate Judge issued an Order Re Evidentiary Hearing, granting petitioner's request for an evidentiary hearing on his claims. On January 11, 2001, respondent filed a pre-hearing brief ("RPHB"), and on the same date petitioner filed a pre-hearing brief ("PPHB"). On February 2, 2001, respondent filed a motion in limine, seeking to restrict the evidence presented at the evidentiary hearing. Petitioner filed an opposition on February 9, 2001, and respondent filed a reply on February 16, 2001.

Respondent filed a "Summary Statement of Evidence at Petitioner's Trial on Los Angeles County Superior

Court" ("RSS") on February 16, 2001, and petitioner filed "Petitioner's Supplemental Pre-Hearing Brief" ("PSPHB") on the same date.

The evidentiary hearing took place on two dates; March 6, 2001, and May 23, 2001. Petitioner called for the following witnesses: (1) juror Joan Gandy; (2) juror Laura Migliore; (3) juror Marjorie Dolinski; (4) juror Lloyd Zillmer; (5) juror Sandra Williams; (6) police detective Victor Lupu; (7) juror Don Truelson; (8) April Torrance; (9) Lisa Truelson; (10) special agent with the California Department of Justice Christina Burgdorf; (11) investigator Raymond Stevens; (12) investigator Marc Moore; and (13) juror Marian Alice Barnes. [Evidentiary Hearing Transcript, Volume I ("EH I") 11, 31, 44, 53, 61, 65, 84, 128, 143, 165, 169, 179, 227.] Respondent called the following witnesses: (1) Crystal Pinckard; and (2) alternate juror William Schifferlie. [EH I 119; Evidentiary Hearing Transcript, Volume II ("EH II") 5.]

II. STANDARD OF REVIEW

In reviewing a habeas petition by a person in state custody, a federal court is limited to deciding whether the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas relief is not available for state court error in interpreting or applying state law. *Estelle*, 502 U.S. at 67-68; *Bonin v. Calderon*, 77 F.3d 1155, 1161 (9th Cir. 1996).

The present petition was filed after April 24, 1996, and is reviewed under provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v.*

Murphy, 521 U.S. 320, 326-327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The post-AEDPA standard of review is governed by 28 U.S.C. § 2254(d) (as amended), and by the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) interpreting § 2254(d)(1). *See Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000).

AEDPA placed "a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams*, 529 U.S. at 412. Under AEDPA, a federal court may not grant relief on any claim, adjudicated on its merits in state court, unless that adjudication resulted in a decision that was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A federal court must also presume correct any state court factual determination not rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In *Williams*, the Supreme Court explained the distinct meanings of the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)(1). Under the "contrary to" clause:

> a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Williams, 529 U.S. at 412-413. That is, a state court decision is "contrary to" federal law if it either (a) "fails to apply the correct controlling authority," or (b) applies the correct authority, to facts "materially indistinguishable" from those in the controlling case, but reaches a different result. *See Anthony v. Cambra*, 236 F.3d 568, 578 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1576 (2001) (applying *Williams*). "In order to merit habeas relief under the "contrary to" clause of AEDPA, [. . .] a petitioner must show not only that the state court failed to apply clearly established Supreme Court law but also that it reached an *erroneous* decision that warrants the issuance of the writ under the standard in *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (requiring that the error have had a substantial and injurious effect on the verdict)." *Brown v. Mayle*, ___ F.3d ___, 2002 WL 187415 at *4 (9th Cir. Feb. 2, 2002) (emphasis in original); citing *Packer v. Hill*, 277 F.3d 1092, 1102 (9th Cir. 2002), *amended by* ___ F.3d ___, 2002 WL 272557 (9th Cir. 2002).

Under the "unreasonable application" clause:

> a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 413. That is, a state court decision involves an "unreasonable application" if it either (a) "correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable," or (b) "extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Anthony*, 236 F.3d at 578. The requirements for relief are somewhat higher where the state court applied the clearly established federal law but erred in doing so: A state court's decision applying clearly established federal law is "unreasonable" under AEDPA only when the court is left "with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous – in other words that clear error occurred." *Brown*, 2002 WL 187415 at *4; citing *Van Tran*, 212 F.3d at 1153-54. The *Brecht* standard must be met as well in "unreasonable application" cases. *Brown*, 2002 WL 187415 at *4; citing *Packer*, 277 F.3d at 1092.

In applying § 2254(d)(1) a federal habeas court first determines whether the state court decision in question was in error, and then whether it was contrary to or an unreasonable application of controlling law. *See DePetris v. Kuykendall*, 239 F.3d 1057, 1061 (9th Cir. 2001); *Van Tran*, 212 F.3d at 1155, *citing, inter alia, Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 154 L. Ed. 2d 727 (2000). Finally, the court applies the *Brecht*, standard, granting habeas relief only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *DePetris*, 239 F.3d at 1061; citing *Bains v. Cambra*, 204 F.3d 964, 977-78 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000).

When a state court decision articulates a rationale for its conclusion, a reviewing court may straightforwardly apply the *Williams* analysis. When, as here, the California Supreme Court has denied a petition without giving a rationale, this is considered a denial on the merits, and may be presumed to rest on grounds articulated by a lower court in its opinion. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir. 1992). A reviewing court may "look through" such a summary denial and apply the deferential standard of 28 U.S.C. § 2254(d) to the underlying decision. *Packer*, 277 F.3d at 1101; citing *Shackelford v. Hubbard*, 234 F.3d 1072, 1079 n. 2 (9th Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 324 (2001). In petitioner's case this court must "look through" the California Supreme Court's denial to the rationale articulated by the California Court of Appeal in denying petitioner's claims.

III. EVIDENCE PRESENTED AT TRIAL[1]

At petitioner's trial, the prosecution predicted in opening statements that the evidence would show that Brian Stinson murdered Daryl Smith by stabbing him ten times during a fight that occurred at a bachelor party for their mutual friend, Bob Pinckard, on February 12, 1994. [RT 459-65.] In petitioner's opening statement, defense counsel explained that the evidence would show that the tragic death of Daryl Smith resulted from a tense and dangerous situation where fights broke out among young men at a bachelor party who were drinking excessively and were aroused by strippers. During the second fight to occur that night, the defense contended, Brian Stinson believed that he needed to pull a knife to defend himself from serious bodily injury or death. [RT 466-71.]

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[1] The following summary of evidence presented at trial derives from Petitioner's Supplemental Pre-Hearing Brief at pp. 2-12. The court has thoroughly reviewed the trial transcripts and finds this summary to be substantially accurate. Where necessary, the court has included excerpts from Respondent's Summary Statement of Evidence at Petitioner's Trial in Los Angeles County Superior Court. In addition, the court has supplemented the summary where evidence pertinent to its analysis is absent from the factual summaries filed by the parties.

A. PROSECUTION CASE

On February 12, 1994, Brian Stinson attended a bachelor party for Bob Pinckard at 1818 South Indian Summer in West Covina. Petitioner Stinson had met Pinckard two and one-half years earlier through Pinckard's fiancé, Nicole Slaughter. Slaughter was a friend of petitioner's girlfriend, Jennifer Bidrzycki. [RT 707, 869-70, 1778.]

When Isaac Valenzuela arrived at 9:30 p.m., there were about 20 to 25 people at the party. [RT 473-74, 478, 543-44.] The total number of guests who attended the party that night ranged somewhere between 40 and 60 people. [RT 761-62.] Valenzuela knew guests Daryl Smith and his brother, Danny Smith, but did not know petitioner. [RT 479-80, 966.] Daryl Smith was 17 years old at the time. [RT 477-79, 494-95.]

Bob Pinckard showed petitioner a folding knife with a blade between three and four inches long and one inch wide that he clipped on his pocket. [RT 736-38, 774, 777, 907, 1240, 1280.] Scott Spindola, Andrew Manna and Justin Scalzi had similar knives. [RT 1216-18, 1238, 1240-41, 1247-48, 1740.] Petitioner, Chad Price and as many as eight other guests showed Spindola their knives. [RT 1111-13, 1255-58, 1275-76, 1279, 1281, 1632-38, 1640-41, 1696-97, 1746-47.] Petitioner and Chad Price had the bigger knives. [RT 1258.] Petitioner kept his knife in his pants pocket. [RT 1276-77.] Although no one else was seen with a knife that night, other guests were known to carry knives. [RT 778-80, 906-08, 990, 1012, 1019, 1220, 1229-30, 1238-39, 1244-45, 1251-52.]

Strippers performed at about 10:15 p.m. in the garage. [RT 480.] The garage, which was about 18 by 20 feet in size, had been decorated with black plastic on the walls, a black light and some splattered paint on the plastic that showed up in the light. [RT 481, 483.] People brought chairs in. [*Id.*] About 25 to 30 males entered the garage for the show. [RT 482.] Some people had to stand. [RT 483.]

Valenzuela, who had consumed three beers, joined the other guests in the garage and sat between Daryl and Danny Smith. [RT 481-84, 544, 550-52, 966, 1020-21.] Daryl had also been drinking. [RT 549.]

The crowd hollered and screamed during the show. [RT 484.] People placed money on themselves or on Bob Pinckard, and the strippers removed the money. [*Id.*] Several times money fell to the floor, after it had been thrown toward Bob, but had fallen short. [RT 485.] Once, some money fell on the ground in front of Mr. Valenzuela. [*Id.*] He picked it up and handed it back to someone behind him, and was told to "just go and put it on Bob." [*Id.*]

Petitioner dropped two dollar bills on the floor. [RT 486, 1260.] Daryl picked up the dollar bills. [RT 486, 1260.] Scott Spindola testified that Daryl picked up the money and put it in his pocket. [1260.] Petitioner then tapped Daryl on the shoulder and told him to give the money to Pinckard. [RT 1260-61.] Daryl told petitioner to "fuck off" and threw a punch. [RT 1260-61.] Isaac Valenzuela, however, testified that Daryl bent over to pick up the money, and as he was doing so, the stripper came by and took it. [RT 486.] Out of the corner of his eye, Isaac saw a saw a hand moving in Daryl's direction. [487-88.] The hand moved too fast for Isaac to tell whether it was open or closed in a fist. [RT 488.] Next, Isaac saw Daryl laying on the ground and people falling to the ground, trying to pull Daryl and another guy apart. [*Id.*] The two men on the ground were throwing punches at each other. [RT 489.] The fighting went on for ten or fifteen seconds. [RT 490.] The show stopped. [*Id.*]

James Molina became angry after he was hit in the back of the head. Molina threw a punch at Daryl as he got up, because he assumed that Daryl had started the fight, was causing trouble, and that Daryl had hit him. [RT 573, 580-85, 588, 591-92, 628-29, 973.]

Daryl and the other man were separated, and Isaac and Danny Smith took Daryl Smith outside. [RT 490.] They took him outside to "cool him off, to explain to him, 'hey, you know, this is a bachelor party, we are celebrating our friend's marriage, he is going to be married next week. This stuff doesn't take place at things like that'." [RT 490-91; 588-89.] Spindola grabbed petitioner and took him outside. [RT 1263, 1746.]

Daryl was upset and mad because he had been "cold-cocked" for no reason. [RT 491.] Daryl's left eye appeared to be a little swollen and red. [*Id.*] In addition to Danny Smith, James Molina and Brian Ritchie came out of the garage. [RT 492.] When Molina exited the garage, he was hostile. [RT 584.]

Soon after, the strippers apparently "just up and left" and everybody came out of the garage. [RT 492.] Daryl pointed petitioner out to Isaac as the guy who had hit him [*Id.*] Daryl kept saying that it wasn't right that petitioner had hit him without any warning. [RT 493-93.] Mr.

Valenzuela repeatedly told Daryl to relax, that this was not the place for fighting, and that Daryl should just let go and forget it. [RT 493.] After hearing Daryl explain what had happened, James Molina apologized to Daryl. [RT 591, 628-29.]

Daryl's brother, Danny, was upset and kept saying that it wasn't right that his brother had been hit. [RT 593-94.] He told Isaac, "you should let Daryl and him go at it and have a fair fight . . ." [RT 594.]

Isaac walked over to petitioner, extended his hand and introduced himself. [RT 493.] As he walked up to petitioner, petitioner looked upset, as if he was thinking, "hey, what's going on here?" [RT 602.] He looked like he could have been afraid, or concerned. [RT 602, 630.] Mr. Valenzuela said, "I'm Daryl's friend. He is like a little brother to me. I have known him a long time." [RT 493.] When petitioner tried to explain what had happened, Isaac told him that he didn't need to hear an explanation just as long as there was no more fighting. [RT 493-94.] Petitioner responded, "[t]hat's good, I don't want any trouble. That is cool, bro. I don't want any trouble." [RT 494.] Isaac said, "[g]reat, neither do we," and shook his hand. [*Id.*] Petitioner appeared to be genuinely sorry. [RT 631.] During this conversation, about ten of petitioner's friends were standing around him. [RT 494.] Isaac described the attitude of those people as "snide" – not aggressive or angry, just kind of snide. [*Id.*] Isaac told petitioner, "[h]ey, you know, if you want to be the biggest man around here as far as I'm concerned, would you please go up to my friend and apologize." [RT 495.] Petitioner said, "[n]o problem," and Isaac called Daryl over to shake petitioner's hand. [*Id.*]

Daryl was still upset, and reluctantly shook petitioner's hand. [RT 495, 1040.] While the two were shaking hands, petitioner's friends were not saying anything. [RT 496.] However Daryl's friend, Brian Ritchie kept telling Daryl, "I wouldn't do that if I was you." [*Id.*] Also, Danny Smith asked Isaac why he was so passive. [*Id.*] Isaac responded by saying that he had been around longer, and that they should just let it go. [*Id.*] Danny told Daryl, "don't let him get away with it." [RT 950, 971-76, 1006-07, 1031-37, 1044, 1056, 1100, 1238, 1241-42, 1264.]

Valenzuela could feel the tension between petitioner and his friends and Daryl and Danny Smith and their friends. People were staring or making "little snide remarks, like, 'I wouldn't let that happen' or like, you know, 'he is a wimp' or stuff like that."[2] [RT 500] These statements were being made by people from both groups. [*Id.*] Everyone was "just sitting around staring." [*Id.*] Isaac felt that the staring and chuckling was mainly directed toward his group of friends, because he did not know the majority of the other people at the party. [RT 502.] He estimated that petitioner's group of friends consisted of about 15 to 19 people. [*Id.*]

Before the wives and girlfriends arrived, people were slam dancing. [RT 623.] Isaac sensed problems during the slam dancing because three or four guys would link up and go around and around and nudge Isaac and his friends every time they came by. [*Id.*] They would also laugh and make comments. [RT 623-24.] Daryl said, "I know what they're up to." [RT 624.] Isaac told him to just "let it slide" and to stay behind him. [*Id.*] Isaac had been slam dancing at the beginning of the party with Bob, but neither he nor Daryl had slam danced any more after that. [*Id.*] Isaac didn't see petitioner slam dancing. [RT 631.]

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[2] It is not clear from Mr. Valenzuela's testimony whether it was petitioner or Daryl Smith who was being called a "wimp."

When Isaac's wife arrived later in the evening, he told her that he had a bad feeling about the party and wanted to leave. [RT 505.] He also told her about the incident that occurred in the garage. [*Id.*] Even after Shannon Valenzuela arrived, Daryl Smith stayed close to Isaac. [*Id.*] Isaac did not observe any contact between petitioner and Daryl. [*Id.*] He testified that petitioner remained at the fire pit during most of the party, while Daryl was standing with Isaac and others the whole time. [*Id.*]

When the wives and girlfriends arrived at the party, the tension diminished somewhat. [RT 506.] Daryl and Danny, however, were still upset when Danny's girlfriend, Vanessa Silva, arrived to pick him up around 11:30 p.m. [RT 1101-03.] At that point Danny told Daryl not to worry, that they would just get him another time. [RT 1102-03.]

Isaac Valenzuela separated from Daryl after his wife had been there for about a half an hour, because Isaac wanted to take his wife down the street and show her the house he had grown up in. [RT 506.] He and his wife were outside looking at the house and talking for about 15 or 20 minutes when Brian Ritchie, Daryl, Danny, and his girlfriend, Vanessa, approached them. [RT 507, 606-07, 654-55.] After they talked a little more, the group decided that it was getting cold and there was a "bad vibe" at the party, so they should leave. [RT 508.] Isaac didn't feel comfortable at the party because his group of friends was outnumbered by about two to one, and he still detected some attitude from petitioner's group of friends. [*Id.*] The group was planning to take several cars and go to one of their homes to drink some more beer and relax. [RT 509-10.]

When the group was about to leave, Bob Pinckard and Nicole Savage drove up after having gone to the store to buy more beer. [RT 510.] The couple wanted the group to stay. [*Id.*] Shannon also wanted to stay, but Isaac just wanted to go back in to say goodbye to everyone. [*Id.*] Isaac walked straight back to the fire pit, where Bob and Nicole were, said goodbye to three or four other people and grabbed four beers. [RT 516.] Danny was concerned when Daryl got out of Vanessa's car and ran back toward the party calling after Valenzuela. [RT 994, 1051, 1057-59, 1095-96.]

Shannon went after Daryl and caught up with him. She saw petitioner and another man walking to the backyard about five or six feet ahead of them. [RT 656-57, 660, 662, 817-23, 998.] Petitioner's hands were in his pockets. [RT 661] Daryl pointed out that petitioner was the guy that he had fought with earlier. [*Id.*]

Daryl began to whistle. [RT 663.] He whistled twice. [RT 825.] Shannon assumed that he was whistling at petitioner, to get his attention. [RT 663.] She did not ask him why he was whistling, or tell him to stop. [RT 828.] Petitioner's companion looked at petitioner and then looked back at Shannon and Daryl about three times. [RT 663, 826.] Shannon's "impression was that he wanted something to be done. Like the way he was like – looking like what are you going to do, you know." [RT 664.] Shannon did not see the companion saying anything to petitioner. [*Id.*] Petitioner just looked straight ahead. [*Id.*]

Shannon had no sense of fear as petitioner and his friend walked onto the grass. [RT 669.] As they reached the grass area, petitioner "turned around and then started swinging." [RT 670-71, 699, 702, 828-30.] Shannon did not see anything in petitioner's hands as he turned around and started to fight. [RT 672-73.]

Daryl blocked petitioner's first punch, then started swinging his arms. [RT 674, 830, 849.] Shannon didn't hear any of them say anything before fighting. [*Id.*] Nor did she see anyone walking toward petitioner looking threatening or menacing. [RT 678.]

Shannon yelled for them to stop fighting, and other guests ran over to stop the fight. [RT 675, 830-31, 850-51.] Daryl and petitioner were each landing punches on the other's upper torso area. [RT 675.] Shannon saw Daryl and petitioner each land about two punches on the other. [RT 676.] Petitioner appeared to be gaining the advantage over Daryl because he was walking toward Daryl and Daryl was backing up. [RT 678.] Daryl appeared to be about three inches taller than petitioner. [RT 853.] Shannon did not see any weapons. [RT 677.]

Petitioner tried to grab Daryl, who lost his balance, and they both fell to the ground. [RT 678-79.] Daryl fell on his back with petitioner on top of him. [RT 679.] Shannon kicked at petitioner's upper back to make him stop fighting. [RT 676, 679.]

At this point, it was ". . . just complete chaos. Just people, you know, running over I guess to see what's happening, and people pulling people off and punching and, just you know, it was like complete pandemonium." [RT 680, 836-38.] Shannon lost sight of petitioner and

Daryl because there were bodies all over. [RT 680-81, 836-37.] As people were trying to pull other people out of the fight, they would start fighting amongst themselves. [RT 682-83, 836.] People were swinging at each other, but Shannon did not see any kicking. [RT 683.] Bob Pinckard's fiancé, Nicole, had a clear view as she stood no more than two to three feet from Daryl and petitioner as they wrestled on the ground. Nicole never saw a knife. [RT 936-38, 943.]

Daryl came up from the bottom of the pile of people and stood up as others ran from the yard and someone held petitioner. [RT 683-85, 764, 768, 838-40.] Nicole told Shannon that Daryl had been stabbed. [RT 685-86, 842.] Shannon and Nicole propped Daryl up. [RT 511, 516, 519, 523-24, 527, 613, 687, 759-60, 840, 896-97, 1097.] He was bleeding from the stomach and chest. [RT 524, 531-32, 720, 898-99, 910, 1097.] Petitioner was gone. [RT 718-19, 722, 764, 769.] Bob ran out in front of the house to see if he could see petitioner, but petitioner had left. [RT 764-66.]

People were cursing, screaming, and fighting as Valenzuela and Nicole took Daryl into the kitchen. [RT 524, 527, 619, 687-89, 692, 724, 842, 899-901, 1000-01, 1075.] Someone called the police. [RT 528, 535, 619, 687-88, 899.] Daryl was gurgling hyperventilating and getting cold. [RT 526, 532.] Valenzuela and Nicole administered C.P.R. [RT 526-27, 532-33, 901, 905, 1001.]

While they were tending to Daryl, Nicole heard a window break and heard people saying that a beer can had been thrown through it. [*Id.*] She saw a person who yelled, "the motherfucker deserved what he got." [RT 693.] She did not know the person, but he had dark hair and was wearing a flight jacket. [*Id.*] After making the comment, he started fighting with Brian Ritchie, who was angry about what had happened to Daryl. [RT 527, 536, 691-94, 845-47, 1001-03, 1042, 1118.]

The paramedics arrived and told everyone to go outside. [RT 537.] When the police arrived, they directed the remaining guests to stay in the backyard under the covered patio, then interviewed them one-by-one. [RT 538.]

Bob Pinckard received a page at 2:03 a.m. [RT 725, 731.] He recognized the number as Colin Costello's number. [*Id.*] After that number, the display read "9-1-1" four times. [*Id.*] Colin Costello was a friend of petitioner's. [*Id.*] Bob was speaking with detectives at the time he received the page, and told them that "[t]his could be them . . . I need to use the phone." [*Id.*]

Bob had already told the detectives that he believed that Brian Stinson may have been involved in stabbing Daryl. [RT 726.] He told them this because Brian and Daryl were the only two involved in the scuffle. [*Id.*]

When Bob called the number on the pager, Jennifer Bidrzycki answered. [RT 727.] He asked where she was. [*Id.*] She said they were at petitioner's aunt's house. [*Id.*] But Bob had recognized Colin Costello's telephone number, and knew that she was in a different location. [*Id.*] He told her that Daryl was seriously hurt and that they did not know what was going to happen. [RT 727-28, 1804.]

Petitioner was arrested at his grandmother's house around 9:00 a.m. on February 13, 1994. [RT 1124-25, 1164, 1809, 1854-56.] He had a bandage on his inner forearm and cuts on his right wrist and hands. [RT 1125-27, 1824-25.] Although he did not have any injuries on his hands or body consistent with either punching or having been punched, it was not uncommon for someone in a fight not to have such injuries. [RT 1128-30, 1144-45.]

Petitioner's uncle, David Molash, gave detectives petitioner's folding knife (with dried blood on it) that had been given to him by Jennifer Bidrzycki. The knife was three and one-half inches long and one inch wide. [RT 1133-36, 1157-58, 1164, 1168, 1255, 1691-92, 1706-07, 1837.] Petitioner was very confused, scared, tired, crying and incoherent when he told Molash and several relatives that he might have stabbed Daryl once or twice. [RT 1159, 1164-67.]

The autopsy conducted on February 14, 1994, revealed that Daryl suffered ten stab wounds: four to the chest; one to the right forearm; one to the left forearm; one to the left elbow; one on the right back near the armpit; one on the right back; and one on the right buttocks. [RT 1171, 1174, 1176-78.] Two chest wounds penetrated Daryl's liver; one his heart; and the other, his stomach. [RT 1178-80.] The liver and heart wounds were fatal. [RT 1189.] All of the wounds were made by a single-edge sharp instrument and consistent with the knife that Molash had given the police. [RT 1178-82, 1187, 1206.]

The cause of Daryl Smith's death was massive blood loss that resulted from multiple stab wounds to the chest and abdomen, lacerating his heart and the liver. [RT 1189.] There was blood in his chest cavity, and the wounds to his rib and sternum caused his lungs to collapse. [RT 1190.]

The coroner could not determine whether Daryl's injuries were inflicted while he was standing up or laying down. [RT 1196-97.] The coroner could not determine whether only one, or more than one, knife caused Daryl's injuries. [RT 1199.] Examining the stab wounds to Daryl's body, the coroner determined that there were no hilt marks associated with any of the fatal wounds. [RT 1199-1201.]

A penetrating knife wound can be larger, but cannot be smaller, than the size of the knife used to inflict it. [RT 1211.] Two of the chest wounds were three and one-half inches deep and one inch wide, and the other two were three and one-half inches deep and seven-eights inches wide. [RT 1203-04.] All of these wounds could have been inflicted by a knife blade longer than three and one-half inches. [RT 1204-05.]

B. THE DEFENSE CASE

Petitioner testified in his own defense. He was 20 years old and lived and worked in Laguna Hills at the time of the bachelor party. [RT 1871, 1877.] Rick Orona and Brian Cholewiak were at Colin Costello's house when he arrived around 6:00 p.m. on February 12, 1994. [RT 1878-1879.] They all stayed there until 8:00 p.m. afterwards they picked up Craig Steele and bought beer and wine and Jack Daniels punch at a Covina market. The group then stopped at Kenny Petrick's house to tell him to pick up Pat Ricci. The group arrived at Bob Pinckard's bachelor party around 9:15 p.m. [RT 1879-1881, 1972.]

When petitioner arrived at the party, Bob Pinckard was standing in the street a few houses down. [RT 1882.] Bob had his knife out, and was "screwing around." [*Id.*]

Petitioner carried a knife for a number of reasons, including protection. [RT 1988, 2007.] Petitioner and his friends went inside together. [RT 1882.] Petitioner knew some of the guests but did not know Daryl or Danny Smith. [RT 1884-85.] He was in the backyard with Cholewiak when he, Chad Price, Scott Spindola, and Justin Scalzi showed each other their knives. [RT 1885-89, 1970-73, 1976.]

The strippers arrived about forty-five minutes later, and forty or fifty guests went into the garage for the show. [RT 1883, 1889.] Petitioner was in the back leaning on a chair next to Cholewiak and Spindola. [RT 1890.] Daryl, Isaac, and Brent Pomeroy were sitting in front of petitioner. [RT 1891-92.]

Petitioner leaned over and tried to throw two dollars onto the floor for the strippers. [RT 1892-93, 1978.] Petitioner's money landed in front of Daryl, who picked it up and put it in his pocket. [RT 1893.] After petitioner tapped Daryl on the shoulder and said the money was his, Daryl swung at him. [RT 1893-94, 1978-80.] The two exchanged blows. [RT 1894, 1981.] Someone grabbed petitioner, and someone else grabbed Daryl. [RT 1895-96, 1981-82.] Danny Smith swung at petitioner after asking why petitioner had hit Daryl. [RT 1895-97.]

Petitioner stayed in the garage when Daryl went outside with Danny, Isaac, and two other men, one of whom had "Skins" tattooed on his fingers. [RT 1898-1901, 1905, 1982.] Petitioner looked down as seven or eight guys stared and pointed at him. [RT 1903.] Petitioner walked over to Daryl, apologized, and offered his hand after Daryl, Danny and another man came back into the garage about five minutes later. [RT 1899, 1901-02.] Daryl refused to shake petitioner's hand and the other man said, "you guys are going to finish it later." [RT 1902.]

Petitioner became scared when the man with the tattoo said, "this is the American Front" and asked petitioner if he had a problem. The man said he was going to deal with petitioner. [RT 1904-05, 1984-85.] Cholewiak pushed the man out of the way and said they wanted no problems. [RT 1905.] Isaac Valenzuela came up to petitioner introduced himself and shook his hand. [RT 1906, 1985-86.] When petitioner told Valenzuela that he had tried to shake Daryl's hand but Daryl had refused, Valenzuela brought Daryl over and had him shake petitioner's hand. [RT 1906-08, 1986.] Petitioner hugged Daryl and told him he was not a fighter. [RT 1907, 1989.] Daryl said, "okay, it's done." [RT 1907.]

Petitioner started to get pretty scared as Danny Smith and a couple of others stared at him and snickered among themselves. [RT 1913-15, 1995.] He thought everything was fine, however, by the time his girlfriend Jennifer Bidrzycki and the other women arrived. [RT 1914-16, 1995.] Petitioner and Paul Krugman went out to petitioner's car to get a CD. Daryl and others were by another car. [RT 1917, 1919-23, 1991, 1998-99.]

As petitioner and Krugman walked back to the party, petitioner heard a whistling noise. Shannon Valenzuela said "that's him." [RT 1923-25, 1955, 1995-96, 2001.] Petitioner was then struck in the head from behind and fell forward. He turned to see Daryl's fist coming at him. He was scared and started swinging. [RT 1926-27, 2001-02.] Daryl had the advantage as they exchanged blows. [RT 1927-31.] Petitioner could hear yelling and noticed people who were behind him running fast toward him. He was afraid they were going to jump him and he would be seriously hurt. [RT 1929-31, 1936, 1941, 1965.]

Petitioner took out his knife from his pocket and opened it, hoping to scare Daryl, but Daryl kept coming. [RT 1936, 1941, 1964, 1966-67, 2011-12.] He did not see Daryl holding a weapon. [RT 1967-68.] Petitioner stabbed Daryl twice before they fell to the ground with Daryl on top. He was holding the knife while they rolled around and other people kicked them. [RT 1932, 1937-39, 1958-59, 1962-63, 2003, 2007-13.] Petitioner was pinned down and could not move his arm. He did not stab Daryl in the buttocks or the back. [RT 1939-40, 2010-11.]

Bob Pinckard pulled Daryl off of petitioner, who got up and called for his girlfriend, Jennifer. He took off running after he saw Danny coming at him. [RT 1941-43.] Petitioner, Jennifer, and Krugman got into petitioner's car and drove to Colin Costello's house. [RT 1944-45.] Petitioner told them that he had stabbed Daryl. [RT 1944.]

Petitioner was in a state of shock and did not know what to do when he left the knife under Costello's bed before driving home to Laguna Hills with Jennifer. [RT 1948-49, 1960.] When petitioner learned that Daryl had died, he called his grandmother who came to pick him up. She took him back to her house so he could surrender to the police. [RT 1950-53.]

Kenneth Petrick was in the garage when petitioner threw money on the floor and Daryl picked it up. Daryl wadded the money into a ball and threw it in petitioner's face. [RT 1505-06, 1622-23.] Daryl and petitioner exchanged words before fighting. [RT 1506-07.] Other people were throwing punches as Daryl jumped in and wrestled petitioner. Danny yelled, "American Front." [RT 1507, 1624.]

The one or two minute fight ended and petitioner went inside. [RT 1507, 1555, 1558.] Danny and Brian Ritchie encouraged Daryl to hit petitioner. [RT 1509-10, 1523, 1572, 1575, 1581-82, 1624, 1653.] Daryl was looking at the ground when petitioner shook Daryl's hand. Daryl said, "it's cool." [RT 1511, 1581, 1625.]

Things remained tense, however, as Daryl, Danny, Ritchie, and a couple of others followed petitioner around and stared at him. [RT 1513 1572-73, 1693, 1768-87.] Later, Patrick saw a scuffle with petitioner and Daryl fighting and the crowd around them pushing and screaming. [RT 151-19, 1551, 1561-64.] Daryl was on top of petitioner when they fell to the ground and rolled around. Daryl stood up and started to walk away, but could not, and was helped to the kitchen. [RT 1517, 1520, 1523-24, 1566, 1568-69, 1605, 1609-10, 1616, 1647-52, 1698-99.] Brian Ritchie hit Rick Orona, who threw a beer bottle through [t]he kitchen window. [RT 1523, 1584, 1593, 1610-11, 1614, 1662-63, 1677, 1680, 1708.] Although Petrick had seen most of the men at the party carrying knives in the past, he did not see anyone with a knife that night. [RT 1522, 1548-49.]

Paul Krugman and petitioner went to get a CD from petitioner's car sometime after the fight in the garage. They walked by two women and a man. [RT 1295-1301, 1338-39, 1414-15, 1534-36, 1578-79, 1589-91, 1789, 1864.] One of the women made a derogatory comment as Krugman and petitioner returned to the party. [RT 1304, 1340, 1418, 1457-58, 1599.] Krugman saw Daryl and two women walking five or six feet behind them as he and petitioner approached the gate to the backyard. [RT 1305-06, 1340-42, 1420-21, 1458, 1485-86, 1491, 1599-1600, 1642, 1790, 1863.]

Petitioner's hands were at his side when Daryl hit petitioner from behind with a closed fist. Daryl and petitioner hit each other before falling and rolling around on the ground. [RT 1306-08, 1349-50, 1400-01, 1405, 1418-26, 1457, 1459, 1465-66, 1469-71, 1482, 1600-01, 1604-05, 1643, 1789-92, 1813, 1815-17.] Fifteen or twenty people surrounded petitioner and Daryl. Some were kicking, hitting, and shoving while others were trying to stop the fight. [RT 1309, 1350-57, 1422-23, 1425-27, 1465, 1481, 1602, 1607, 1644-47, 1650, 1661-62, 1671, 1700-01, 1711, 1793-96, 1818, 1856-57.] Neither Krugman, Bidrzycki, Michelle Leyvas, nor Brian Cholewiak saw anyone, including petitioner, with a knife. [RT 1308, 1426, 1490, 1603, 1798.]

Petitioner got up when the fighting stopped and ran from the backyard to his car with Krugman and Bidrzycki. [RT 1309-10, 1360-61, 1796-98.] Petitioner did not have blood on his hands. [RT 1362.] People were pushing and shoving and crying and screaming. Danny Smith came out of the house and yelled, "who stuck my brother?" Danny then hit Orona. [RT 1431, 1434-35, 1463, 1486-87, 1527.]

Petitioner was nervous and scared as they drove to Costello's house in Covina. [RT 1311-12, 1375, 1377, 1381-82, 1690-91, 1704.] Krugman noticed a little bit of blood on petitioner's knife while they were in the car. [RT 1312-13, 1373-74, 1376, 1385-86, 1823-24, 1830, 1832, 1843, 1859, 1869, 2017.] Petitioner said he could not believe that he had stabbed Daryl. [RT 1313, 1379, 1799-1800, 1826, 1844.] Petitioner told Jennifer that he had stabbed Daryl because he was scared. [RT 1800-01.]

In the backyard of the house where the party took place, police found a knife on top of a wooden cabinet next to the garage. [RT 1761-65.] The knife was a little more than three inches long and five-eighths of an inch wide. There was no blood on it. [RT 1764.]

C. PROSECUTION'S CASE IN REBUTTAL

According to City of West Covina detective Frank Harden, Jennifer Bidrzycki was interviewed by police and told them that when she got in the car with petitioner, he told her he stabbed someone and showed her blood on the knife. He then put the knife in his pocket and that must have been where he had kept the knife. [RT 2015-17.]

Jennifer told police that she walked behind Daryl Smith when he went back to the party before the second fight. He was walking with one person, who appeared to be male. [RT 2026.]

Defense investigator Marc Moore testified that Brian Cholewiak told police that in the first fight, petitioner threw the first punch after petitioner threw down two to three dollars for the stripper and Daryl Smith picked up the bills. [RT 2027-28.] Petitioner asked Daryl Smith why he picked up the money, and Daryl Smith did not respond to that question. [RT 2028.]

Brian Cholewiak said that at the start of the second fight, he saw Daryl Smith jump up behind petitioner and the two began to exchange blows. [RT 2028-29.] He did not indicate that petitioner was punched in the back of the head. [RT 2029.]

Shannon Valenzuela is a very tall woman with big bones. She was wearing a black flight jacket and dark jeans that night. If it were dark outside, she could be mistaken for a man. Shannon Valenzuela was the first person to assist Nicole Savage in helping to get Daryl Smith from the yard to the kitchen. [RT 2034-36.]

D. CLOSING ARGUMENTS

1. Prosecution

The prosecution contended, during closing arguments, that the killing of Daryl Smith was unlawful. As to petitioner's claims of self defense, the prosecutor's position was that "the belief for which that self-defense was created was unreasonable and to some exten[t] dishonest given the physical evidence that was [presented at trial]." [RT 2105.] Moreover, the prosecutor argued that based on his actions, the jury could infer that petitioner committed the murder with malice aforethought. [RT 2105.]

Turning to the physical evidence, the prosecutor contended that the knife in evidence was consistent with the depth and width of the stab wounds about which the coroner had testified. [RT 2106.] Further, the nature of each of the ten stab wounds was consistent with the fact that the knife blade was sharp on one side and blunt on the other. [RT 2107.]

The prosecutor pointed out that the lighting at the party was extremely dim, and there was substantial commotion on the night of the killing, so that eyewitnesses may not have been able to see the knife. [RT 2107-09.] In addition, the prosecutor asked the jury to consider the pattern of the stab wounds. Eight of the ten wounds were located on the right side of Daryl Smith's body, which the prosecutor asserted indicated that someone who was left-handed (as petitioner is) had created all of the stab wounds. [RT 2110-11.]

The prosecutor suggested a sequence of the stabbings to the jury. While standing up, petitioner allegedly stabbed Daryl four times. [RT 2112.] The next three stab wounds (to Daryl's right wrist, elbow and left forearm), the prosecutor contended were created when petitioner and Daryl were on the ground. [RT 2112-13.] Stab wound 8 was important, the prosecutor asserted, because the coroner had testified that given its depth it would have punctured Daryl's lung. However, it did not, because the lung had already collapsed by that point due to one of the first four stab wounds. [RT 2113.] According to the prosecutor, stab wounds 8, 9, and 10 likely took place when the two were in a clenched position. [RT 2113.]

As to the eyewitness testimony, the prosecutor noted that the prosecution witnesses (Isaac Valenzuela, Shannon Valenzuela, and Daniel Smith, in particular) had testified to both the positive and the negative regarding their actions that day. [RT 2114-15.] In contrast, the defense witnesses had purportedly come across as if they were "angelic" and "calm," giving the impression that the victim's friends were the aggressors. [RT 2115.]

Specifically, the prosecutor gave as an example the fact that Shannon Valenzuela testified to the fact that Daryl had whistled at petitioner prior to the second, fatal fight. [RT 2116.] The prosecutor contended that this testimony could have implied that Daryl was looking for a fight. [*Id.*] However, Shannon did not withhold the testimony, making her more credible. [*Id.*]

The prosecutor emphasized Shannon's testimony that petitioner had his hands in his pockets as the second fight began. [RT 2117.] Based on this evidence, the prosecutor hypothesized that petitioner had the knife in his hand at the beginning of the second fight when he turned around and started punching Daryl. [*Id.*] Further, the prosecutor pointed out that none of the eyewitnesses had testified to having seen petitioner's version of events in which he allegedly stopped and took the knife out of his pocket and unfolded it. [*Id.*]

Relying on the testimony of Brian Cholewiak, the prosecutor argued asserted that attendees of the bachelor party had compared knives after the first fight. [RT 2119.] From this, the prosecutor suggested that the jury could "infer perhaps preparation, or at least: What do you got? You guys are ready? [¶] Those guys were trying to start something earlier. What's on you? Who can we count on? What's going on?" [RT 2119.]

The prosecutor also asserted that the petitioner's group of friends outnumbered the victim's by about a three to one ratio. [RT 2120.] He contended that this killing was not a tragedy as the defense had contended in opening statements. [RT 2120.] The prosecution contended that "[t]his attack had a purpose and intent." [*Id.*]

Reviewing the evidence of petitioner's actions after the stabbing, the prosecutor encouraged the jury to find that the evidence of petitioner's flight indicated guilt. [RT 2123-26.]

Petitioner's own testimony, the prosecutor contended, proved that he intended to stab Daryl Smith. [RT 2127.] Although petitioner had testified at trial that he had intended to scare Daryl when he pulled out his knife, the prosecutor argued that the fact that he did not wave it in front of Daryl but instead approached him and stabbed him, undercut petitioner's testimony. [RT 2127.] Further, the prosecutor reminded the jury that it had heard from petitioner's own mouth that he had intended to stab Daryl when he moved the knife toward his chest. [RT 2127-28.]

Petitioner's statement that he had stabbed Daryl only twice, the prosecutor asserted, reflected a natural tendency to mitigate his own wrongdoing. [RT 2128-29.] The prosecutor closed with the assertion that the ten stab wounds provided ten reasons why this killing went beyond voluntary manslaughter, and indicated that the killing was not done in the heat of passion. [RT 2131.]

2. Defense

Petitioner's trial counsel began his closing argument by emphasizing that the prosecution had asked the jury to consider many possibilities as to what may have happened. [RT 2136-39.] However, he reminded the jury that if they could only reach a belief that "this is what probably took place;" there was reasonable doubt. [RT 2139.]

In response to the prosecutor's assertion that the defense witnesses were not credible, defense counsel encouraged the jury to consider the detail with which they testified and the consistency in their testimony. [RT 2140.] In contrast, defense counsel brought to the jury's attention elements of Isaac Valenzuela's testimony that undermined his credibility. [RT 2140-43.]

Specifically, defense counsel noted that despite being in the immediate vicinity of both fights that occurred that night, Isaac testified that he did not see or hear aspects of the fights to which other witnesses had testified. [RT 2140-43, 2148.] Defense counsel also contended that Shannon Valenzuela's testimony was inconsistent with Isaac's testimony as to the timing of them returning to the party after being at Jenny's car ready to leave. [RT 2143-44.] Compared with Nicole Pinckard's testimony that she had passed out beer to both Isaac and Shannon in the backyard of the house, defense counsel contended that Shannon could not have been walking into the backyard with Daryl at the time that she claimed to have been doing so. [RT 2144, 2145-46.]

Defense counsel took issue with the prosecutor's characterization of petitioner's friends as troublemakers. [RT 2148.] He pointed out that during three weeks of trial testimony there had not been "one scintilla of a piece of evidence indicating that Brian and his friends did anything to promote this, to encourage it, to aid it, to foster it." [RT 2149.]

Based on the testimony of Paul Krugman and Shannon Valenzuela regarding petitioner's reaction to Daryl's whistle prior to the second fight, defense counsel asserted that petitioner attempted to "keep his head down" and avoid trouble. [RT 2150-52.] Petitioner and his friend kept walking, defense counsel contended, because they didn't want trouble. [RT 2152.]

Petitioner was afraid, counsel contended. [RT 2152.] He was "afraid because of the things that were said before. He [was] afraid of the comments that [were] made with respect to American Front. That you don't know who you're dealing with." [*Id.*]

As to the resolution of the first fight, defense counsel asserted that petitioner's actions were those of someone who was not looking for a fight. [RT 2155.] Defense counsel reminded the jury that testimony from numerous witnesses indicated that petitioner was not the aggressor at the start of the second fight. [RT 2156-57.]

Defense counsel continued as follows:

> He's attacked and he's hit in the back of the head and he's stunned. [¶] His brains are shooken up, the way he articulated it, and he starts fighting. [¶] At the same time while he's fighting, what takes place? He sees all these other legs running at him. Don't know whether it is a friend or foe. [¶] He has a knife and he use[s] the knife. He uses the knife in self-defense. He's defending himself.
>
> Ladies and gentlemen, when do you stop defending yourself? When do you start defending yourself, when you've had your brains beaten in? When you are on the ground getting kicked? You are subjecting yourself to great bodily injury by a blow to the head, a blow to the face. When is the appropriate time to use deadly force? Is that being reasonable? Is that what a reasonable man would do?
>
> See, you have to decide what a reasonable man would do. Is that something a reasonable man would do?

[RT 2157-58.]

Defense counsel then emphasized the importance of the jury instructions and reviewed in detail the self defense jury instruction. [RT 2159-60.] He further reminded the jury that a killing is lawful if it was justifiable because it was in self defense. [RT 2161.] If a reasonable person being attacked would believe that an assault with the fists is likely to inflict great bodily injury, counsel asserted, then use of a deadly weapon is justified. [RT 2162.]

Reviewing several other self defense jury instructions, defense counsel asserted that the tension had been building the entire evening of the killing. [RT 2162-63.] No rules were set for the fight, counsel contended, and petitioner was attacked, feared he was losing the fight, and defended himself. [RT 2163.]

Defense counsel pointed out that none of the witnesses testified that after Daryl and petitioner fell to the ground, they saw a left-handed person stabbing Daryl in the back. [RT 2164.] They did not see punches being thrown once the two were on the ground. [*Id.*]

Defense counsel noted that depending on which witnesses the jury believed, the fight ranged from involving only petitioner and Daryl to involving almost everyone at the party. [RT 2165.] He contended that it was chaotic, and terrifying. [*Id.*]

In response to the prosecution's assertions regarding each of the stab wounds, defense counsel asked the jury whether it had proven to them that each and every one of those knife wounds resulted from petitioner's knife. [RT 2166.] Defense counsel noted that the coroner did not eliminate all of the other knives that were at the party. [*Id.*] Furthermore, defense counsel encouraged the jury to consider the coroner's testimony that a wound can be larger than the knife that created it, but not smaller. [RT 2167.] Petitioner's knife was one inch in width, and, defense counsel asserted, only two of the stab wounds were [one] inch in width. [RT 2168.]

Defense counsel then reviewed the evidence indicating other attendees at the party who were carrying knives. [RT 2168-69.] Counsel contended as follows: "In fact as we sit here, do we know for a fact, do we know for a fact that Daryl Smith was not carrying a knife? That Daryl Smith didn't use a knife? that Daryl Smith wasn't planning on using a knife? Do we know that for a fact? Nobody saw this particular weapon." [RT 2169.]

Defense counsel asserted that the physical evidence was not consistent with the weapon introduced at trial. [RT 2172.] Based on the coroner's testimony, defense counsel argued, it was "impossible." [*Id.*]

As to the prosecutor's contentions regarding petitioner's flight as evidence of consciousness guilt, defense counsel asserted that petitioner was trying to preserve his health. [RT 2175.] Had petitioner remained at the scene, defense counsel asserted, there was a good possibility that he would have been "lynched." [*Id.*] Petitioner at that point, counsel reminded the jury, did not know the severity of the situation. [RT 2176.] He was extremely upset and emotional. [*Id.*] After going to Laguna Beach, petitioner called his family who returned him to the area where he was arrested. [*Id.*] Defense counsel emphasized that petitioner's family did not hide or clean the knife. [RT 2177.] Their actions, counsel contended, were not consistent with flight. [*Id.*]

In conclusion, defense counsel asked the jury to find that this was a justifiable homicide. [RT 2178.] However, he urged the jury, if it found that petitioner's belief that he was in danger was not reasonable, to reach a verdict of voluntary manslaughter. [*Id.*]

IV. PETITIONER'S CONTENTIONS

Petitioner seeks grant of a writ of habeas corpus on the following five grounds:

1. Petitioner was denied the right to a fair and impartial jury when jurors committed prejudicial misconduct by introducing extraneous evidence into their deliberations. [Trav. 3.] Specifically, the following extraneous evidence was allegedly introduced during deliberations:
    a. Juror Williams set forth her "expert" opinion as an emergency room nurse that the injury to the victim's eye obtained during the first fight was caused by the butt of a knife and not by petitioner's fist.[3]
    b. Juror Truelson conducted an experiment to determine whether a CD would fit into a pants pocket and discussed the results with the other jurors.
2. Petitioner was denied the right to a fair and impartial jury when several jurors committed prejudicial misconduct by discussing the case amongst themselves prior to deliberations. [Trav. 9.]
3. Petitioner was denied the right to a fair and impartial jury when the jury foreman committed prejudicial misconduct by giving false answers on voir dire. [Trav. 10.]

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[3] As discussed below, the Magistrate Judge recommends grant of the habeas petition on this claim.

4. Petitioner was denied the right to a fair and impartial jury when the jury committed prejudicial misconduct by considering penalty and punishment in reaching a verdict. [Trav. 10.]
5. Petitioner was denied due process and his right to a fair trial when the trial court ordered petitioner to stop investigating jury misconduct and thereafter refused to hold an evidentiary hearing on the matter. [Trav. 11.]

V. OPINION OF THE CALIFORNIA COURT OF APPEAL

The California Court of Appeal found that juror misconduct had occurred at petitioner's trial, however, it concluded that petitioner was not prejudiced by the misconduct. [MTD, Ex. E 195.] Initially, the Court of Appeal noted that petitioner's evidence of juror misconduct was inadmissible hearsay. [MTD, Ex. E 195-97.] Further, it found that petitioner had not demonstrated a strong possibility that prejudicial misconduct had occurred. Nor had he shown that the parties' evidence was materially in conflict. Accordingly, under California law, the court concluded he was not entitled to an evidentiary hearing on his juror misconduct allegations. [*Id.*]

The Court of Appeal then examined each of petitioner's assertions of misconduct. With respect to the jury's discussion of extraneous matter (namely, juror Williams' theory that the abrasions above Daryl Smith's eye were made by the butt of a knife), the Court of Appeal stated, in pertinent part:

> [Juror] Lloyd Z. told the investigator that a juror, whom he believed was a woman, pointed out to other jurors that the cut above the victim's

eye, received in the first fight, could have been made by a knife held in the hand when the blow was delivered. The juror pointing this out said she had been an emergency room nurse. "She explained that the cut could have been made when the [petitioner's] clenched fist made contact with the victim's face, while holding the knife, with the blade of the knife sticking up between his thumb and forefinger, and the butt of the knife protruding from the bottom of the hand . . . She told the rest of the jury that the cut was 'too clean' to be a cut from [petitioner's] fist, but believed that this was a cut resulting from the butt of the knife striking the victim's face." Don T. also told the investigator that one juror "did bring up the fact that she believed the knife was in [petitioner's] hand during the first fight because of the cut on the victim's head."

As noted *ante*, these statements are hearsay and, therefore, incompetent and insufficient to impeach the jury's verdict. [citations omitted.]

[Juror] Joan G. declares that one juror, a nurse by profession, explained that the cut near the victim's eye could not have been made by a fist. She said she had seen cuts and bruises in the past as a nurse. In her opinion, this cut was made by the butt of the knife making contact with the eye area. In addition, this juror gave a medical explanation of how the victim's knife wounds could have been made by [petitioner's] knife. This explanation went beyond the coroner's testimony.

The victim received the black eye and the cut above his eye in the first fight he had with [petitioner]. If the cut necessarily was caused by a knife, then it may be inferred that he had his

> *knife in his hand during the first fight. The question remains whether that inference is prejudicial to [petitioner].*
>
> *The second fight occurred 45 minutes or more after the first fight. [Petitioner] admitted he stabbed the victim repeatedly, aiming for the chest area. He admitted he knew the victim was unarmed.*[4] *With those admissions, both self-defense and imperfect self-defense fly right out the window – even if the victim was the aggressor. With those claims demolished, the least offense of which [petitioner] could have been convicted is the one of which he was convicted, second degree murder. Under an objective standard, therefore, a conclusion that he had the knife ready in his hand during the first fight could not have affected the outcome of the case. The misconduct was not prejudicial. [citation omitted.]*

[MTD, Ex. E 198-99 (emphasis added).]

Next, the Court of Appeal addressed petitioner's contentions of misconduct based on jurors' discussions with non-jurors or pre-deliberation discussions with jurors. It found that "conversations between William S. and Don T. after William S. was excused were gossip concerning the jury and the course of jury deliberations." [MTD, Ex. E 200.] Finding that these conversations constituted jury misconduct, the Court of Appeal found that gossiping about the jurors and their deliberations did not demonstrate bias. [MTD, Ex. E 200-01.] The appellate court found that in light of the strength of the evidence against petitioner, "the conversations appear[ed] to have been trivial." [*Id.*] Therefore, it concluded that there was no substantial likelihood that Don T. was influenced by the conversations. [*Id.*] As to conversations between Don T. and William S. about numbers on a pager, the Court of Appeal stated, "this collateral and uncontested matter had no conceivable bearing on [petitioner's] guilt or innocence. Again, the presumption of prejudice has been rebutted by the nature of the conversation and the strength of the evidence against [petitioner]." [MTD, Ex. E 201.]

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[4] As discussed below, this factual finding by the Court of Appeal was incorrect and provides the basis for this court's recommendation that the petition be granted. Petitioner did *not* testify that he knew that Daryl Smith was unarmed. [RT 1936-68.] The record reflects only that petitioner testified that he did not see weapons in Daryl Smith's hands, nor did he see him reach for a weapon. [RT 1961-62, 1967-68.]

With regard to petitioner's allegations that Don T. answered falsely on voir dire, the California Court of Appeal analyzed the claim as follows:

> Don T. was asked on voir dire whether he knew any of the named witnesses and whether he had any friends or relatives in law enforcement. He answered both questions negatively. When asked whether he knew witness Bob Pinckard before the trial, Don T. told the investigator that when Pinckard walked in, he "didn't think that was going to be Bob Pinckard." He said he did not know any of the witnesses that were called to testify, which surprised him, in that they all lived fairly close to him. When asked whether he knew Vic Lupu, one of the

police officer witnesses,[5] he said Lupu was his "'good buddy.'"

Officer Lupu told the investigator that he met Don T. when their daughters were playing softball. He knows Don T. well enough to say "hello" when they meet and carry on general conversation, most of which is about baseball. In other words, he knows Don T. by name and sight. He has never socialized with him. He believes Don T. knows he is a police officer.

Lisa T., Don T.'s daughter, and Crystal Pinckard, Bob Pinckard's sister, told the investigator that they knew each other casually from school. They were never true friends. Lisa T. said she did not know Bob Pinckard. Crystal Pinckard said her brother did not know Lisa T.; to the best of her knowledge, Lisa and Bob never dated. April Torrance told the investigator that Crystal Pinckard and Lisa T. were good friends in high school and "hung out" with her. She remembers Lisa T. telling her Bob Pinckard was at some of the parties Lisa attended.

As noted *ante*, inasmuch as these statements are hearsay, they are incompetent and insufficient to impeach the jury's verdict. [citations omitted.] Even if the statements were to be considered, however, they would not demonstrate the existence of prejudicial misconduct.

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[5] The Court of Appeal is incorrect in this regard. Vic Lupu was not one of the witnesses who testified at trial. Nor did he have any involvement in petitioner's case.

> Don T.'s statement that Officer Lupu was his "good buddy" must be considered in context with the statement of Officer Lupu himself. When so considered, it is clear that Officer Lupu and Don T. were the most casual of acquaintances. They did not socialize; they were not friends. Accordingly, Don T. did not misstate the facts when he said on voir dire that he had no *friends* in law enforcement.
>
> There is *no* evidence Don T. knew the witness, Bob Pinckard – even if one may infer that his daughter, Lisa, did know this person. At most, Don T.'s statement to the investigator suggests he knew *of* Bob Pinckard and was surprised when this witness came into the courtroom, thinking Bob Pinckard was someone else. Consequently, there is no evidence Don T. misstated the facts when he said on voir dire that he did not know any of the witnesses.

[MTD, Ex. E 202-03.]

Continuing on, the California Court of Appeal found that Don T.'s discussion during deliberations of an experiment he had conducted with a CD was misconduct. [MTD, Ex. E 204.] It also found that, "while touching on a collateral matter, this test of [petitioner's] testimony bore directly on his credibility." [*Id.*] However, because the CD fit in Don T.'s pocket, the Court of Appeal found that the experiment could not have been harmful to petitioner's credibility. [*Id.*]

Finally, as to petitioner's claims that the jurors improperly discussed penalty or punishment during deliberations, the Court of Appeal found that the jurors' discussions were merely speculative and were isolated and infrequent. [MTD, Ex. E 205.] In addition to the fact that petitioner's evidence to support this contention was inadmissible evidence of the subjective reasoning process of the jurors, the Court of Appeal found that the jurors' limited discussions of penalty were not prejudicial. [MTD, Ex. E 206.]

VI. EVIDENCE PRESENTED AT EVIDENTIARY HEARING

The evidentiary hearing in the instant case occurred on March 6, 2001, and May 23, 2001.

A. JOAN GANDY

The first witness called by petitioner was juror Joan Gandy. [Evidentiary Hearing Transcript, Vol. I ("EHT I") at 11.] Ms. Gandy testified that during deliberations, there was a discussion about an experiment that Don Truelson had conducted with a CD. [EHT I 14, 17.] Although Ms. Gandy did not recall, she confirmed that her prior declaration must have been correct in stating that the outcome of the experiment had been that the CD fit tightly in Mr. Truelson's pocket. [EHT I 25.] She further testified that the CD experiment was "brought up, for a lengthy period of time, the first time it was brought up, probably the first day, and a little less time the second day." [EHT I 17.]

Ms. Gandy testified that during deliberations, juror Williams had told the other jurors that she felt that the cause of the victim's injury over his eye during the first fight had been the butt of a knife, not petitioner's fist. [EHT I 18-19.] Ms. Gandy testified that it appeared that Ms. Williams felt she was an expert because she was a nurse who had worked with juveniles. [EHT I 20.] Ms. Williams was "very emphatic" about her belief. [EHT I 23.]

Ms. Gandy recalled Mr. Truelson and an African-American woman juror discussing this information. [EHT I 21.] Ms. Gandy stated, "I think they, they really listened, though. I was listening to her." [EHT I 20.] Ms. Gandy further testified that Ms. Williams had not reached her conclusions about the knife butt on her own; "as conversation would go on, then she [Williams] would say, oh yes, and this, And then, and all of this came about, over a period of time, and different ones interjected." [EHT I 29.]

Ms. Gandy also testified that she "saw, on many occasions . . . conversations that [she] felt were inappropriate . . . " [EHT I 21-22.] In addition, she testified that during deliberations some of the other jurors would talk in a manner that led her to believe that they had discussed particular items of evidence previously. [*Id.*] However, Ms. Gandy never actually heard any inappropriate conversations. [EHT I 25-27.] Nor did she have a specific recollection of what was said during deliberations that led her to believe that other jurors had discussed the evidence previously. [EHT I 27.]

B. LAURA MIGLIORE

Petitioner's next witness was juror Laura Migliore. [EHT I 31.] Ms. Migliore recalled that one of the jurors had conducted an experiment with a CD and then discussed it with the other jurors. [EHT I 33-34.] While she did not recall independently, Ms. Migliore acknowledged that she had declared in December of 1997, that the jurors had discussed the CD experiment on the second day of deliberations. [EHT I 35.] Ms. Migliore did not remember any other discussions about witnesses or evidence, including discussions about a knife butt causing the injury to the victim's face. [EHT I 35-36.]

C. MARJORIE DOLINSKI

Juror Marjorie Dolinski testified that she did not hear or participate in, any inappropriate discussions of the evidence with other jurors outside of deliberations. [EHT I 45-46, 52.]

D. LLOYD ZILLMER

Juror Lloyd Zillmer testified that the jury discussed the picture of the injury to the victim's face. [EHT I 54.] He recalled one of the jurors suggesting that the cause of the injury was a knife butt. [EHT I 55.] Mr. Zillmer testified that the conversation of the topic "went on for awhile." [EHT I 58.] Although he couldn't recall, he thought the discussion occurred on the second day of deliberations. [EHT I 59.] Mr. Zillmer did not discuss the evidence in the case outside of deliberations. [*Id.*]

E. SANDRA WILLIAMS

Sandra Williams, who has been a Registered Nurse since 1978, testified that she was a juror in the Stinson case. [EHT I 61-62.] Ms. Williams did not recall the injury to the victim's face. [EHT I 63.] Nor did she recall one way or the other whether there were any discussions of her expertise as a nurse and whether the facial injury could have been made by the butt of a knife. [*Id.*]

F. VICTOR LUPU

Detective Lupu is a police officer with the City of Covina who knew Don Truelson in 1994. [EHT I 65-66.] He met Mr. Truelson in 1990 or 1991 when their daughters played in the same softball league. [EHT I 67.] Both Detective Lupu and Don Truelson had coached softball off and on during an eight year period. [EHT I 68-69.] During that eight year period, Detective Lupu's and Mr. Truelson's daughters were on the same softball team two or three times. [EHT I 69-70.] During the seasons when their daughters were on the same team, Detective Lupu and Mr. Truelson would see each other at the games. [EHT I 70-71.] When their daughters were not on the same team, Detective Lupu and Mr. Truelson would see each other at games when their teams played each other. [EHT I 70.] There is a "softball community" that developed as a result of the league that Detective Lupu's daughter played in. [EHT I 71.] Through this community, Detective Lupu came to know Don Truelson. [*Id.*]

Detective Lupu and Don Truelson had never socialized together away from the softball field. [EHT I 75.] The only time they had ever been at each other's homes was to drop off or pick up their daughters. [*Id.*] At softball games, they generally discussed softball. [EHT I 76.] Detective Lupu was aware that Mr. Truelson worked for the County in some capacity, and Truelson knew that he was a police officer for the City of Covina. [*Id.*] Detective Lupu did not talk about his job with Mr. Truelson on any regular basis. [EHT I 77.]

Detective Lupu believed that Mr. Truelson had dropped Lupu's daughter off at home at least once. [EHT I 71.] On one or two occasions, both Detective Lupu's and

Mr. Truelson's daughters were on the same all-star team. [EHT I 72.] On at least one occasion, the Lupu and the Truelson families stayed in the same hotel in Northern California when their daughters played in All-Star games there. [EHT I 80-81.] However, there were eight to ten families who stayed in the same hotel. [EHT I 82.]

Detective Lupu did not know anything about petitioner's case. [EHT I 78.] He had no involvement in investigating the case. [*Id.*] Detective Lupu considered Don Truelson an acquaintance. [*Id.*]

G. DON TRUELSON

Don Truelson was the jury foreperson at petitioner's trial. [EHT I 84-85.] He did not consider Victor Lupu a "good buddy" in 1994. [EHT I 85.] Mr. Truelson testified that he did not state to an investigator that Vic Lupu was his "good buddy." [EHT I 86, 99.] Don Truelson knew Vic Lupu because their daughters played softball in the same league. [EHT I 86.]

When Mr. Truelson was interviewed by investigator Marc Moore in 1994, Truelson became upset with the investigator because he felt that he had conducted the interview under false pretenses. [EHT I 90-91.] The investigator had given he [sic] impression that he was interested in Mr. Truelson's opinion of the defense attorney's performance, when in fact the investigator wanted to know whether he knew Vic Lupu. [EHT I 91.]

During voir dire, Mr. Truelson answered that he did not know anyone in law enforcement. [EHT I 97.] He did not mention Vic Lupu because he considered him only an acquaintance. [*Id.*] Mr. Truelson told Agent Burgdorf during an interview after the verdict, that he did not mention Vic Lupu when answering questions on voir dire because he considered Lupu only an acquaintance. [EHT I 98.]

Mr. Truelson testified that he had no recollection about a discussion about the cause of a cut on the victim's face during deliberations. [EHT I 101.] He recalled some discussion about whether a CD fit in a pocket, but did not remember an experiment involving a CD. [EHT I 101-02.]

Mr. Truelson had never heard of the name "Pinckard" before petitioner's trial. [EHT I 103.] In explanation of his statement to the defense investigator that he "didn't think that was going to be Bob Pinckard," Mr. Truelson stated: "In, like, what I used to do, when I was, worked in an office. There's somebody you deal with, on the phone a lot, and you have a perception of what they look like, just as in this court case, you hear a particular name, you get a perception of what you think they're like, and it could be totally different than what they actually are. [¶] It has no reference to what they were in the future, if I knew them in the future, or saw them, or anything." [EHT I 104-05.] Mr. Truelson testified that he became aware after the trial that Bob Pinckard's sister, Crystal, was someone that Mr. Truelson's daughter knew from school.[6] [EHT I 114.]

Mr. Truelson remembered an alternate juror named Mr. Schifferli. [EHT I 105.] He did not discuss evidence with Schifferli prior to Mr. Schifferli's discharge from jury service. [EHT I 106.] Mr. Truelson did not recall whether he had discussed evidence regarding a pager with Mr. Schifferli. [*Id.*] Mr. Schifferli did not call Mr. Truelson during the deliberations because he did not have Truelson's telephone number [EHT I 107.] They spoke on the telephone within a month or two after the verdict. [EHT I 108.] He had Mr. Schifferli's telephone number, and called him to tell him the verdict because he knew Mr. Schifferli was interested in the outcome. [*Id.*]

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[6] The parties stipulated that Bob Pinckard would have testified that he did not know Don Truelson or Lisa Truelson. [EHT I 236-37.]

It is possible that Mr. Truelson had friendly conversations with another juror who was interested in financial planning. [EHT I 115.] Mr. Truelson has never used the services of a financial planner or an investment adviser. [EHT I 116.]

H. CRYSTAL PINCKARD

Crystal Pinckard attended Charter Oak High School in Covina. [EHT I 119.] Bob Pinckard is her half brother. [EHT I 120.] He attended West Covina High School. [*Id.*] Crystal knew Lisa Truelson, but they were acquaintances only. [EHT I 121-22.] She never introduced Lisa to Bob Pinckard. [EHT I 123.]

Crystal testified that she would find it odd to picture Lisa Truelson and Bob Pinckard together. [*Id.*] When asked to explain, she testified: "Because my brother is, I don't know if anybody's ever seen my brother, but he's kind of, at that time, from what I take from my father, he was kind of, kind of like a white supremacist, into that type of scene." [*Id.*] As to his appearance, Crystal testified that it was unusual: "The tattoos. The 'peckerwood' tattooed across his stomach, the shaved head, all the tattoos everywhere, and that would be it." [EHT I 124.]

Crystal was in choir class with Lisa Truelson and April Torrance. [EHT I 126.] Crystal did not recall having lunch with April and Lisa. [EHT I 126-27.] Crystal didn't participate in athletics; she was not on a softball team. [EHT I 127-28.]

I. APRIL TORRANCE

April Torrance attended Charter Oaks High School and was friends with Lisa Truelson. [EHT I 128-29.] April and Lisa had lunch together almost every other day during their sophomore and junior years. [EHT I 129.] April had met Lisa's father, Don Truelson. [EHT I 129-30.] "He was the type of person I guess you could say that didn't want his daughter to get into trouble and would know their – know the friends, you know, I guess you could say, like any father would I guess with their daughter." [EHT I 130.]

April had lunch with Lisa Truelson and Crystal Pinckard most of the time during her sophomore year of high school. [EHT I 130-31.] April had met Bob Pinckard once at Crystal's house. [EHT I 135-56.] He was a "skinhead." [EHT I 136.] April had never heard of Lisa Truelson having any contact with him. [EHT I 137.] Nor had she ever seen Don Truelson with Bob Pinckard. [*Id.*]

J. LISA TRUELSON

Lisa Truelson graduated from Charter Oaks High School in 1993. [EHT I 143.] She and April Torrance were friends for awhile during high school. [EHT I 143-44.] They were better friends during her sophomore year than later in high school. [EHT I 144.] By senior year, their only contact was that they attended choir class together. [EHT I 145.]

Crystal Pinckard was a school acquaintance. [*Id.*] Lisa never saw Crystal outside of school. [EHT I 145-46.] The only time when they might have had lunch together would have been during Lisa's sophomore year, and Lisa did not recall having lunch with Crystal. [EHT I 146-47.] Lisa testified that based on the choir picture from her sophomore year, it appeared that Crystal Pinckard was also in choir class, but Lisa didn't really remember her. [EHT I 152, 154.] In the photograph, Lisa is standing next to Crystal Pinckard. [EHT I 159.] However, the choir members were seated for the picture according to their voices. [EHT I 159-60.]

During high school, Lisa was not aware that Crystal had a brother named Bob. [EHT I 148.] Lisa highly doubted ever having told April Torrance that she had attended parties where Bob Pinckard was present because she did not know who he was. [EHT I 148-49.] She did not associate with "skinheads" while in high school. [EHT I 154.]

Lisa's father expressed an interest in who her friends were. [EHT I 150.] Her parents never told her to stay away from certain types of people; they expected her to have common sense. [EHT I 151.]

Lisa Truelson knew Vic Lupu as the father of one of the girls with whom her sister, Monica, played softball. [EHT I 155, 157.] She described her father's relationship with Vic Lupu as follows: "Yeah your softball friends kind of deal where you don't really hang out outside of – you see each other at the game, it's like a school thing. You see each other at the game, you say hi, you're social, you kind of know what's going on with them and their family, and hey that's great see you guys next week." [EHT I 155.] To Lisa's knowledge, Vic Lupu and her father never socialized outside of softball. [EHT I 156.]

Lisa's father never had a conversation with her prior to the defense investigator's interview in which he asked whether she knew Bob Pinckard. [EHT I 158.] He also never mentioned to her that one of the witnesses at the trial in which he was a juror had been Crystal Pinckard's brother. [*Id.*]

K. CHRISTINA BURGDORF

Christina Burgdorf is a Special Agent with the California Department of Justice. [EHT I 165.] She conducted investigation for the respondent in the instance case. [*Id.*]

Agent Burgdorf interviewed Don Truelson on November of 2000. [*Id.*] Mr. Truelson told her that he had become upset with defense investigator Marc Moore because he felt that he had been misled about the purpose of the interview. [EHT I 166.] When agent Burgdorf asked why during voir dire, Mr. Truelson had not mentioned Vic Lupu as a friend in law enforcement, he told her that he considered Mr. Lupu an acquaintance. [EHT I 167.] In order to explain how he knew that Vic Lupu was a peace officer, Mr. Truelson had said "you come to know everyone's business in the softball community." [EHT I 167-68.]

L. RAYMOND STEVENS

Raymond Stevens is a licensed investigator in the State of California. [EHT I 169.] Mr. Stevens spent twenty-four years with the Ventura County Sheriff's

Office, and since 1990, has conducted investigations in criminal cases including post-conviction cases. [EHT I 169-70.] Mr. Stevens conducted several interviews in the instance case at the request of petitioner's counsel, Ms. Wefald. [EHT I 170.]

Mr. Stevens interviewed juror Laura Migliore. [*Id.*] After interviewing her, he provided information to Ms. Wefald, who prepared a declaration. [EHT I 171.] When Mr. Stevens returned to Ms. Migliore to have her sign the declaration, she did not appear to be uncomfortable signing it. [*Id.*]

Ms. Migliore told Mr. Stevens that the jurors did not follow the judge's instruction not to discuss the case prior to deliberations. [EHT I 172.] She also told Mr. Stevens that, on the second day of deliberations, the jurors discussed an experiment that the foreman had conducted with a CD. [*Id.*]

M. MARC MOORE

Marc Moore is an investigator with the San Bernardino Public Defender's Office. [EHT I 179-80.] Mr. Moore worked with petitioner's defense counsel at trial. [EHT I 181.] Mr. Moore prepared a report dated February 4, 1995, containing information pertaining to the interviews he conducted related to the instant case. [EHT I 181-82.]

Don Truelson was one of the people Mr. Moore interviewed in connection with the case. [EHT I 183.] Mr. Truelson told him that Vic Lupu was a "good buddy" of his. [*Id.*] Providing testimony that the court considers for its impeachment of Mr. Truelson's prior testimony only, Mr. Moore testified that Mr. Truelson told him that one of the jurors had brought up the fact that she believed a knife was in petitioner's hand during the first fight because of the cut on the victim's head. [EHT I 188.] Mr. Truelson also told Mr. Moore that he had conducted an experiment with a CD and had discussed the experiment with other jurors. [EHT I 188-89.]

With respect to Bob Pinckard, Mr. Moore understood Mr. Truelson's statement, "I didn't think that was going to be Bob Pinckard," to mean that he was surprised that it was Bob Pinckard. [EHT I 190.] Mr. Moore believed that Mr. Truelson knew Bob Pinckard, but didn't think he was the same Bob Pinckard who was involved in the trial. [*Id.*] Mr. Moore's impression was that Mr. Truelson had known Bob Pinckard prior to the trial. [EHT I 191-92.] When Mr. Moore interviewed April Torrance regarding whether Lisa Truelson knew Bob Pinckard, Mr. Moore did not clarify ambiguities in Ms. Torrance's statements. [EHT I 208-09.]

Mr. Moore further testified that he had interviewed juror Dolinski, who had told him that she and some of the other jurors had discussed Michelle Leyva's testimony after hearing it. [EHT I 192.] These discussions occurred prior to deliberations. [EHT I 192-93.] However, Mr. Moore failed to get clarification from Ms. Dolinski as to exactly when the foregoing conversations occurred, and it is not impossible that they could have occurred during deliberations. [EHT I 210-11.]

In addition, Mr. Moore interviewed juror Gandy. [EHT I 193.] Ms. Gandy told Mr. Moore that one of the jurors who was a nurse had relied on her medical expertise to explain her conclusion that a knife butt had caused the injury to the victim's face. [EHT I 194-95.]

At the start of Mr. Moore's interview of Mr. Truelson, he gave the impression that his questions concerned attorney performance at trial. [EHT I 199-201.] When Mr. Truelson told Mr. Moore that Vic Lupu was his "good buddy," Mr. Moore did not follow up to find out what he meant by the statement. [EHT I 202-03.] Nor did Mr. Moore seek elaboration from Mr. Truelson with regard to his statement about Bob Pinckard. [EHT I 204-05.] Mr. Truelson did tell Mr. Moore that he did not know any of the witnesses who testified at trial. [EHT I 205.]

N. MARIAN ALICE BARNES

Marian Alice Barnes was a juror at petitioner's trial. [EHT I 227.] Ms. Barnes recalled that one of the jurors was a nurse. [EHT I 228.] However, Ms. Barnes did not recall that juror mentioning that she was a nurse in connection with the wounds on the victim's face. [*Id.*] Ms. Barnes did not remember any discussion about the wounds on the victim's face being caused by a knife butt. [EHT I 228-29.]

Ms. Barnes did not recall discussions of the evidence among jurors outside of deliberations. [EHT I 230-31, 233.] She vaguely recalled an issue regarding a CD, but did not recall one of the jurors conducting an experiment with a CD. [EHT I 231-32.]

O. WILLIAM SCHIFFERLI

William Schifferli was an alternate juror at petitioner's trial in 1994. [Evidentiary Hearing Transcript, Volume II ("EHT II") 5.] He was excused from service five to seven days into the trial. [EHT II 6.]

During his jury service, he became acquainted with Don Truelson and discussed financial planning with him. [EHT II 6-7, 11.] Mr. Schifferli had a securities license. [EHT II 7.] He loaned Mr. Truelson a book regarding financial planning, and called him a couple of weeks later to ask whether he could be of assistance. [*Id.*] During that conversation, they discussed the case. [*Id.*] The trial was still ongoing during their first telephone conversation. [EHT II 18.] While they discussed the case, Mr. Schifferli could not recall details of their conversations. [EHT II 24-25.]

Mr. Schifferli called Mr. Truelson again about one week later. [EHT II 18-19.] During the second conversation, Mr. Truelson mentioned that the jury was having trouble reaching a verdict. [EHT II 19.] Mr. Truelson had said that one juror was insisting on a "not guilty" verdict. [*Id.*] In agent Burgdorf's report, Mr. Schifferli's comments regarding the jury's difficulty reaching a verdict are in the present tense. [EHT II 20-21.]

Mr. Truelson did not tell Mr. Schifferli that he could not discuss the case until the verdict had been returned. [EHT II 25.]

In addition, about one or two days into the trial when they were walking out to their cars, Mr. Schifferli discussed the case with Mr. Truelson. [EHT II 7-9, 11, 33.] They discussed the fact that the case presented a sad situation. [EHT II 8.] They also discussed something about evidence relating to a pager. [EHT II 12, 35.] Mr. Truelson did not say that they should not discuss the evidence. [EHT II 26.]

Mr. Schifferli never heard other jurors discussing evidence in the case. [EHT II 34.] After being excused he had no further contact with any of the other jurors except for Mr. Truelson. [*Id.*]

During his testimony at the evidentiary hearing, Mr. Schifferli learned for the first time that he should not have been discussing evidence in petitioner's case outside of deliberations. [EHT II 39-40.]

P. MARC MOORE (recalled)

Mr. Moore interviewed Mr. Schifferli during his investigation. [EHT II 43.] In his report, Mr. Moore noted that Mr. Schifferli said that he had sat next to Don Truelson during the trial. [*Id.*] Mr. Moore had an independent recollection that Mr. Schifferli told him about conversations with Mr. Truelson about things going on in the jury. [EHT II 46.] Mr. Schifferli told him that Mr. Truelson had indicated that Ms. Gandy was causing problems during deliberations. [*Id.*] Mr. Schifferli told him that these conversations with Mr. Truelson occurred after his dismissal from the jury, but prior to deliberations. [EHT II 46-47.]

VII. DISCUSSION[7]

Aside from his claims that the trial court improperly stopped his investigation of juror misconduct and denied him an evidentiary hearing, petitioner essentially asserts four separate claims of juror misconduct, along with the related claim that this misconduct indicates that jury foreperson Don Truelson was biased.

The California Court of Appeal reasonably applied clearly established federal law when it found jury misconduct in each instance petitioner alleged. With the exception of the introduction of extrinsic evidence that a knife butt caused the injury to the victim's face, the Court of Appeal's finding of no prejudice was also a reasonable application of federal law.

However, as discussed below, after thorough review of the record and the applicable federal law, the undersigned Magistrate Judge finds that the introduction and consideration by the jury of extrinsic evidence which was directly related to petitioner's asserted defenses (defenses on which jury instructions were given) constituted jury misconduct, and further that the misconduct had a substantial and injurious effect or influence on determining the jury's verdict.

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[7] The Magistrate Judge has thoroughly reviewed respondent's Objections (filed December 27, 2001) to the Report and Recommendation, and petitioner's Response (filed February 25, 2002). As reflected herein, after thoughtful consideration of the issues raised by the parties, the Magistrate Judge has revised the report and recommendation to more clearly set forth the AEDPA analysis of petitioner's jury misconduct claim based on juror Williams' knife-butt theory. In addition, where appropriate, the court has addressed respondent's objections directly.

Because the state court's decision resulted in a finding that the jury misconduct was harmless, the state court erred. Moreover, the state court decision was the result of an "unreasonable application" of Supreme Court law. 28 U.S.C. § 2254(d)(1). This court's "firm conviction" that the state court was wrong is based on finding two errors in the state courts' analysis. The trial record provides clear and convincing evidence that the California Court of Appeal made an unreasonable determination of the facts when it concluded that petitioner "admitted that he "knew" that the victim was unarmed. 28 U.S.C. § 2254(d)(2). Relying on this factual error, the Court of Appeal ignored trial evidence in support of petitioner's self defense theories, rendering its prejudice analysis clearly erroneous. Furthermore, this court finds that the jury misconduct had a "substantial and injurious effect or influence" on determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 641.

As to petitioner's claim of juror bias, the evidence of misconduct presented simply does not rise to the level of actual bias. Nor was the California Court of Appeal's rejection of petitioner's due process claim in connection with the denial of an evidentiary hearing unreasonable.

A. JUROR MISCONDUCT

1. Legal Standard:

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Mach v. Stewart*, 137 F.3d

630, 633 (1998) (as amended); citing *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Jury exposure to facts not in evidence deprives a defendant of the rights to confrontation, cross-examination, and the assistance of counsel embodied in the Sixth Amendment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (Sixth Amendment right to confront witnesses and conduct cross-examination); *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to a jury trial); *Turner v. State of Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (Sixth Amendment right to trial by jury in which the jury verdict is based on evidence produced at trial); *Mancuso v. Olivarez*, 2002 WL 342061 at *5 (9th Cir., Mar. 6, 2002); *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997); citing *Thompson v. Borg*, 74 F.3d 1571, 1574 (9th Cir. 1996); *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). Due process requires that the defendant be tried by a jury willing and capable to decide the case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner*, 379 U.S. at 472-73.

In conducting their deliberations, "[j]urors have a duty to consider only the evidence which is presented to them in open court." *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); citing *Turner v. Louisiana*, 379 U.S. at 472-73. "Thus, while the jury may properly rely upon its own knowledge and experience in evaluating evidence and drawing inferences from that evidence, there must be sufficient record evidence to permit the jury to consult its general knowledge in deciding the existence of the fact." *United States v. Jones*, 580 F.2d 219, 222 (6th Cir. 1978); citing *Turner*, 396 U.S. at 407; and *Schaefer v. United States*, 251 U.S. 466, 471-73, 40 S.Ct. 259, 64 L.Ed. 360 (1920). Justice Homes observed almost a full century ago in *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558 51 L.Ed. 879 (1907), that one of the precepts of our system is that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Bulger v. McClay*, 575 F.2d 407, 408 (2d Cir. 1978).[8]

"Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed 'extrinsic'."[9] *United States v. Navarro-Garcia*, 926 F.2d 818, 821

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[8] In 1881, Justice Field stated, in *Head v. Hargrave*, 105 U.S. 45, 49, 15 Otto 45, 26 L.Ed. 1028 (1881): "While [the jury] cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry."

[9] Discussing the effect of the jury's consideration of extrinsic evidence, the Ninth Circuit has noted as follows: "In one sense the violation may be more serious than where these rights are denied at some other stage of the proceeding because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact." *Gibson v. Clanon*, 633 F.2d 851, 854-55 (9th Cir. 1980). The Fifth Circuit has referred metaphorically to

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(9th Cir. 1991); citing *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987). "The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from general knowledge, opinions, feelings, and bias that every juror carries into the jury room."[10] *Hard*, 870 F.2d at 1461. "The line between [. . .] permissible activity and the consideration of improper evidence is seldom clear. Yet, where specific facts enter the crucible of decision without appropriate safeguards, the constitutional role of the jury is undermined, and the defendant is denied the fair trial which is his constitutional due." *Bulger*, 575 F.2d at 412.

Nevertheless, due process does not require a new trial every time a juror has been placed in a potentially compromising situation. *Smith v. Phillips*, 455 U.S. 209, 217, citing *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (holding that, where a juror in a federal criminal case was offered a bribe, the trial judge should "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate."); *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950) (holding that "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."); *Chandler v.*

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extraneous evidence as "the dagger of hidden evidence." *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975).

[10] Wigmore notes that "[t]he range of [a jury's] general knowledge is not precisely definable, the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *Jones*, 580 F.2d at 222; citing 9 Wigmore on Evidence § 2570 at 546 (3d ed. 1940).

Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) (holding that the "appropriate safeguard against [prejudice caused by trial publicity] is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly.").

The test to be applied by the trial court where the jury acquires evidence that has not been introduced into the record has been stated by the Ninth Circuit as follows: "the [defendant] is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *Gibson*, 633 F.2d at 853, citing *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979).[11] As noted by the Supreme Court in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 ((1967), "[t]here is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

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[11] The Ninth Circuit has rejected the contention that the introduction of extrinsic evidence is structural error requiring automatic reversal. *See Eslaminia v. White*, 136 F.3d 1234, 1236 (9th Cir. 1998). Finding that the jury's consideration of extrinsic evidence "raises discrete evidentiary issues that the court may clearly identify and analyze, and is similar to other commonly-recognized trial errors," the Ninth Circuit has distinguished such error from relatively rare, structural errors that taint the entire trial process. *Eslaminia*, 136 F.3d at 1237 n.1.

On habeas review, petitioner has the additional burden of establishing that the extrinsic evidence had "substantial and injurious effect or influence in determining the jury's verdict." *Mancuso*, 2002 WL 342061 at *5; citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 & n. 9, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000), *as amended on denial of rehearing* (Dec. 6, 2000) (noting that the *Brecht* standard should apply uniformly in all federal habeas corpus cases under § 2254); citing *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000), *cert. denied*, 531 U.S. 1037 (2000). No bright line test exists to assist courts in determining whether a petitioner has suffered prejudice from juror misconduct. *Mancuso*, 2002 WL 342061 at *5; citing *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997). "We therefore "place great weight on the nature of the extraneous information that has been introduced into deliberations." *Rodriguez*, 125 F.3d at 744. *See Thompson v. Borg*, 74 F.3d 1571, 1574 (9th Cir. 1996) (juror misconduct occurs when a jury introduces into the jury's deliberation a matter which was not in evidence or in the instructions). The potential for prejudice is heightened when a juror interjects into the deliberations "objective extrinsic facts" regarding the accused because that juror becomes an unsworn witness who is not subject to either confrontation or cross-examination. *Mancuso*, 2002 WL 342061 at *5; citing *Jeffries v. Wood*, 114 F.3d at 1490. *See Navarro-Garcia*, 926 F.2d at 821-22 (holding that a juror's personal knowledge or experience constitutes extrinsic evidence where the juror interjects his or her past personal experiences into deliberations in the absence of any record evidence on a given fact).

2. Introduction of Extrinsic Evidence

a. Knife Butt Theory

The evidentiary hearing testimony of Joan Gandy and Lloyd Zillmer indicates that juror Williams raised during deliberations her theory that the injury to the victim's face was caused by a knife butt instead of petitioner's fist. Based on the testimony of jurors Gandy and Zillmer, it appears that this theory was discussed for a significant period of time. Because jury foreperson Don Truelson contradicted his prior statement to defense investigator Marc Moore regarding discussion of the injuries to the victim's face, Mr. Truelson's denial of the occurrence of such discussions carries no weight. Therefore, this court concludes based on the evidence that such discussions occurred during deliberations.

As stated above, where "the jury considered a juror's past personal experiences *in the absence of any record evidence on a given fact*, as personal experiences are relevant only for purposes of interpreting the record evidence." *Navarro-Garcia*, 926 F.2d at 822 (emphasis added); citing *United States v. Jones*, 580 F.2d 219, 222 (6th Cir. 1978); *see also Jeffries v. Wood,* 114 F.3d 1484, 1490 (9th Cir. 1997) ("When a juror *communicates objective extrinsic facts regarding the defendant or the alleged crimes* to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause.") (emphasis added).

Whether the jury has considered "past personal experiences in the absence of record evidence on a given fact" turns on how broadly the "fact" at issue is defined. Respondent contends that the jury heard testimony that the victim's facial injury was the result of being hit by petitioner's fist, and testimony that there were a number of knives at the party.[12] Because the jury could infer from this evidence that petitioner used the butt of a knife during the first fight, respondent urges the court to find that there was no absence of evidence in the record as to the issues raised by juror Williams.[13]

However, as petitioner asserts, the record reveals that juror Williams did not draw the conclusion that a knife butt caused the victim's facial injury based on the evidence. Instead, her conclusion was based solely upon her personal experience and purported expertise as an emergency room nurse. There was no evidence presented on the specific issue of whether a knife-butt caused the abrasion to Daryl Smith's face.[14] Nor did the prosecution present

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[12] Nicole Pinckard testified that she had seen petitioner on previous occasions with a knife. [RT 907.] Petitioner testified that when he arrived at the party an acquaintance, Chad Price, was "screwing around" with him and pulled his knife out and said something to the effect of "hey, you got a problem?" [RT 1881-82, 1973.] Petitioner testified that he, Justin Scalzi Scott Spindola, and Chad Price compared knives soon after petitioner arrived at the party. [RT 1881-82, 1970-72.] Scott Spindola also testified that he, petitioner, and others compared knives when petitioner first arrived at the party. [RT 1255-57.] Mr. Spindola further testified that he had seen "a lot of knives" "throughout the night" carried by maybe three or four people besides petitioner and Chad Price. [RT 1256-57.]

[13] In her Objections, respondent re-asserts this contention. This assertion blurs the line between record, evidence and inferences drawn from that evidence. Moreover, respondent's contention in this regard implicitly recognizes that there is in fact an absence of evidence in the record as to the cause of Daryl Smith's facial injuries.

[14] The entirety of the record evidence regarding the injuries Daryl Smith sustained during the first fight consists of the following. Isaac Valenzuela testified that he saw "a hand come out of the corner of [his] eye and then the next thing Daryl kind of – [. . .] crouched up, and

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evidence or argument to suggest that there was any question with respect to the cause of Daryl Smith's facial injury.

The instant case is analogous to *Navarro-Garcia, supra,* in that the jurors' consideration of their own personal experiences related to a specific "fact" about which there was an absence of evidence in the trial record. *See Navarro-Garcia*, 926 F.2d at 823. In *Navarro-Garcia*, the Ninth Circuit remanded the appellant's case to the district court with an order to conduct an evidentiary hearing on her juror misconduct claims. During trial, evidence had been presented to indicate that upon returning across the U.S. border after going to a dance club in Mexico, Navarro-Garcia had opened her trunk as requested by a U.S. Customs Officer. The trunk contained approximately 344 pounds of marijuana. *Navarro-Garcia*, 926 F.2d at 819. Navarro-Garcia denied knowledge of the presence of the marijuana, stating that someone must have put it in her trunk while she was at the dance club. *Id.* The jurors

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then, you know, just saw a bunch of people fall over . . . [RT 487.] Mr. Valenzuela could not tell whether the hand be had seen was open or closed because it went by too fast, but later he noticed that Daryl's left eye was a little swollen. [RT 488, 491.] Upon being shown a picture of Daryl Smith's injuries, Mr. Valenzuela testified that Daryl had a "black eye." [RT 533-34.] Shannon Valenzuela testified that, when she arrived at the party, she "noticed" that Daryl Smith had a "black eye." [RT 648.] Nicole Pinckard testified that Daryl Smith had a "black eye." [RT 910.] Daniel Smith testified that Daryl Smith's left eye "was kind of – it was like a little bit red." [RT 968.] The coroner testified that photograph A was "the photograph of the injury above the left eye. And it is abrasion and contusion above the left eye." [RT 1175.] Petitioner testified that he had hit Daryl Smith in the left eye. [RT 1894.] Describing the first fight, petitioner testified: "My right hand hit him in the eye and my left hand hit him about like right here, down there (indicating)." [RT 1980.]

considered both their own experiences as well as an out-of-court experiment as to whether it was possible not to notice a weight of over 300 pounds placed in the trunk of one's car. The Ninth Circuit found that, "no evidence was presented at trial regarding the effect on the operation of her car of the added weight of the marijuana in the trunk." *Navarro-Garcia*, 926 F.2d at 823. Accordingly, it found the evidence considered by the jury to be extrinsic.

Similarly, in the instant case, evidence was presented at trial regarding the broader issue of the occurance of a fist fight between petitioner and Daryl Smith, and regarding the fact that knives were carried by petitioner and others at the party. However, there was no evidence presented regarding the specific cause of the injury to Daryl's face and whether the abrasion and contusion could have been caused by the butt of a knife. This was not an issue. Therefore, as in *Navarro-Garcia*, there was an absence of evidence presented regarding the "fact" about which the jury considered non-record evidence. Accordingly, *Navarro-Garcia* supports a finding that juror Williams' "expert" opinion constituted "extrinsic" evidence.

As discussed above, juror Williams' theory exceeded mere "interpretation" of the record evidence. This aspect of juror Williams' "expert" opinion differentiates it from the instance where a juror with medical training simply uses her own background to interpret evidence contained within the trial record.[15]

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[15] Another helpful means of determining whether juror Williams' "expert" opinion was extrinsic, is to consider it in terms of whether the prosecutor would have been entitled to argue such a theory in closing

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This aspect also distinguishes the instant case from *Alexander v. Pliler*, No. C 96-3098 VRW, 1997 WL 154382, *1 (N.D.Cal. Mar. 25, 1997), *cert. denied*, 525 U.S. 936 (1998), in which "a juror who was a medical intern reconciled evidentiary discrepancies concerning the lack of trauma to the victim with his opinion that it was possible that the victim showed no trauma or bruising due to rapid blood loss from being stabbed." There, the court found that the juror "had no personal knowledge regarding the parties or the issues, and his personal knowledge of medicine was applied only to evidence introduced at trial." *Alexander*, 1997 WL 154382 at *2. In that case, prosecution witnesses had testified that the petitioner had repeatedly struck the victim on the face and head with his fist and hands, whereas a forensic pathologist had testified that there was no bruising or trauma to the victim.

Here, juror Williams' "emphatically" asserted her medical opinion that the injury on the victim's face was "too clean" to be a cut from a fist, and she believed that it was caused by the butt of a knife. At petitioner's trial, other than stating that a photograph reflected that Daryl Smith had an abrasion and contusion over his left eye, the coroner did not testify regarding the injuries to the victim's face. None of the witnesses testified to having seen a knife during the first fight. Nor was there any specific testimony as to whether the injury to Daryl's face was

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argument at trial, given that he was restricted to arguing the evidence presented at trial. Review of the trial record suggests that the prosecutor would have been prevented from making such a contention during closing because there was no evidence that petitioner used a knife during the first fight, or that the victim's facial injury was caused by anything other than a fist.

caused by a knife-butt. The only record evidence consisted of general testimony regarding punches being thrown during the first fight. Therefore, unlike the juror in *Alexander*, juror Williams used her expertise as a nurse to provide an opinion to the other jurors on facts about which evidence had *not* been received at trial.

In light of the foregoing, the Magistrate Judge concludes that under federal law juror Williams introduced extrinsic evidence into the jury's deliberations. However, this misconduct supports a finding of constitutional error only if it actually biased the jury's verdict. *Smith v. Phillips*, 455 U.S. at 945-46. Under the appropriate standard on direct review, unless the prosecution proved beyond a reasonable doubt that the misconduct did not contribute to the verdict, a constitutional violation occurred. *Chapman v. California*, 386 U.S. at 24; *Gibson v. Clanon*, 633 F.2d at 853.

The Ninth Circuit has recognized that "[t]here is no bright line test for determining whether a defendant has suffered prejudice from an instance of juror misconduct." *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997); citing *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987.) "In assessing prejudice claims in juror misconduct cases we place great weight on the nature of the extraneous information that has been introduced into deliberations." *Rodriguez*, 125 F.3d at 744; citing *Jeffries*, 114 F.3d at 1490 (finding that "the appropriate focus should be on the nature of the information itself.") "Juror misconduct which warrants relief generally relates 'directly to a material aspect of the case'." *Rodriguez*, 125 F.3d at 744; citing *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981).

Ninth Circuit case law instructs the court to consider "whether there is a 'direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning'." *Rodriguez*, 125 F.3d at 744; citing *Bagnariol*, 665 F.2d at 885. "Typically, juror misconduct which warrants relief involves the introduction into deliberations of matter not in evidence or in the instructions." *Rodriguez*, 125 F.3d at 744; citing *Thompson*, 74 F.3d at 1574. However, the Ninth Circuit has refused to grant a new trial where the extraneous information is cumulative of information presented at trial or immaterial to the ultimate issues. *Rodriguez*, 125 F.3d at 744-45; citing *Bagnariol*, 665 F.2d at 888-89.

Here, the knife butt theory was directly related to petitioner's defenses of self defense and imperfect self defense.[16] if the jury believed that petitioner used his knife

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[16] Under California law, "self defense applies where the defendant believes he or she is facing an imminent and unlawful threat of death or great bodily injury, and believes the acts which cause the victim's death are necessary to avert the threat, and these beliefs are objectively reasonable. *People v. Curtis*, 30 Cal.App.4th 1337, 1357, 37 Cal.Rptr.2d 304 (1995); citing *People v. Aris*, 215 Cal.App.3d 1178, 1186, 264 Cal.Rptr. 167 (1989). "Imperfect self defense applies where the defendant actually believes he or she is facing an imminent and unlawful threat of death or great bodily injury, and actually believes the acts which cause the victim's death are necessary to avert the threat, but these beliefs are objectively unreasonable." *Curtis*, 30 Cal.App.4th at 1354; citing *Aris*, 215 Cal.App.3d at 1186. Imperfect self defense is not a complete defense to homicide. However, it negates malice aforethought and thereby reduces a homicide which would otherwise be murder to voluntary manslaughter. *Curtis*, 30 Cal.App.4th at 1354-55. "[F]or either perfect or imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm – no matter how great the fear and no matter how great the likelihood of the harm – will not suffice. The

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during the first fight, then he may have appeared to be the aggressor during the second encounter as well. This characterization would tend to make it less likely that petitioner was in fear of Daryl Smith and his friends, believing (reasonably or unreasonably), that he needed to defend himself with his knife. Accordingly, there is a rational connection between the extrinsic knife butt evidence and the jury's rejection of petitioner's assertions of self defense or imperfect self defense. Had the jury found petitioner's testimony believable, in conjunction with evidence of Daryl's aggressiveness, it could have convicted him of voluntary manslaughter instead of second degree murder, or could have acquitted him.[17] Therefore,

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defendant's fear must be of *imminent* danger to life or great bodily injury.'" *People v. Hardin*, 85 Cal.App.4th 625, 629, 102 Cal.Rptr.2d 262 (2000) (emphasis in original); citing *People v. Humphrey*, 13 Cal.4th 1073, 1082, 56 Cal.Rptr.2d 142 (1996). To establish self defense or imperfect self defense under California law, there is no requirement that the defendant prove that he believed that the victim was "armed." *See* CALJIC No. 5.31.

[17] Of course, the court is not permitted to seek testimony from the jurors as to how they were affected by the extraneous prejudicial information or outside influence; the jurors may only testify as to its existence. Fed.R.Evid. 606(b); *Tanner v. United States*, 483 U.S. 107, 117-26, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *Hard v. Burlington Northern Railroad Company*, 870 F.2d 1454, 1461 (9th Cir. 1989) (citing *Abatino v. United States*, 750 F.2d 1442, 1446 (9th Cir. 1985) ("[J]urors may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts.")). When an incident subjects the jury to external influence, however, statements regarding it are admissible. *Tanner*, 483 U.S. at 118; *see also Gibson*, 633 F.2d 851. These limitations force the court to make its harmless error determination without the luxury of the jurors' statements as to how they were affected, or not affected, by the extrinsic evidence. It can be said with certainty, however, that the jury considered extrinsic evidence which petitioner had no opportunity to challenge. Further,

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based on the connection between the extrinsic evidence and the defense, this court cannot be certain that the extrinsic evidence did not affect the jury's verdict.

As respondent contends, petitioner did testify that he voluntarily stabbed Daryl Smith. However, this is not inconsistent with self defense or imperfect self defense.[18] Petitioner further testified that he did not see a weapon on Daryl Smith when he stabbed him. In isolation, this testimony may appear to eliminate the self defense theories. In context, however, it is clear that petitioner's testimony did not foreclose a verdict of self defense or imperfect self defense. Nor is there anything in the trial record that would have rendered irrational a finding by the jury that petitioner acted in self defense or imperfect self defense. Indeed, as mentioned above, the trial court instructed the jury on both self defense and imperfect self defense.[19]

In addition to the foregoing, when evaluating the potentially harmful effect of juror misconduct, the Ninth Circuit has found several factors relevant to determining whether the alleged introduction of extrinsic evidence

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that extrinsic evidence went directly to the credibility of petitioner's asserted defenses.

[18] Indeed, these defenses are premised on an intentional killing, and are inconsistent with the claim that the killing was accidental. *Curtis*, 30 Cal.App.4th at 1355; citing *People v. Wickersham*, 32 Cal.3d 307, 328, 185 Cal.Rptr. 436 (1982).

[19] Furthermore, during the discussion of the jury instructions to be given, the prosecutor did not challenge the giving of self defense instructions. [*See* RT 2041-49.] Had there been a colorable argument that self defense instructions were not warranted by the evidence, the prosecutor surely would have asserted such a contention.

constitutes reversible error. They are: "(1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of . . . whether the introduction of extrinsic material [substantially and injuriously affected the verdict." *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995); citing *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); *quoted in Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (noting that "none of these factors should be considered dispositive").

Jurors Gandy and Zillmer indicate that the knife-butt theory was discussed during deliberations for a significant period of time. Mr. Zillmer's testimony indicates that discussions of the extrinsic evidence likely occurred on the second day of deliberations. The jury deliberated for approximately two and one-half days before reaching a verdict. [CT 100, 103, 188.] On the second day, the jury requested petitioner's testimony describing his stabbing of the victim and the coroner's testimony regarding the victim's wounds. [CT 101-02.] The foregoing testimony was read to the jury at 1:50 p.m. on the second day of deliberations. [CT 103.] The next morning at 11:55 a.m., the jury informed the court that it had reached a verdict. [CT 188.] The sequence of events implies that the jury discussed juror Williams knife-butt theory in conjunction with its need for read backs from the record and then reached its verdict the next morning. The court cannot ignore the real possibility that the jury considered the extrinsic knife-butt theory as it was grappling with the believability of petitioner's assertions of self defense.

Based on all of the foregoing, this court cannot conclude beyond a reasonable doubt that the introduction of extrinsic evidence by juror Williams did not affect the verdict. *Chapman*, 386 U.S. at 24.

1) State Court Error:

The California Court of Appeal concluded that, according to juror Williams' "expert" opinion, "[i]f the cut necessarily was caused by a knife, then it may be inferred that [petitioner] had his knife in his hand during the first fight." [MTD, Ex. E 199.] The Court of Appeal found that the introduction of information that permitted this inference constituted juror misconduct.[20] [MTD, Ex. E 199.] Finding that petitioner had testified that he knew that Daryl Smith was unarmed,[21] but stabbed him two times, the California Court of Appeal concluded that petitioner's testimony eliminated the possibility of a manslaughter conviction. Because the jury's verdict of second degree murder was the least severe offense of which petitioner could have been convicted, the California Court of Appeal concluded that petitioner was not prejudiced.

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[20] The Court of Appeal's analysis in this regard is brief, to say the least. The entirety of the appellate court's discussion consists of the statement that juror Williams' "explanation went beyond the coroner's testimony." [MTD, Ex. E 199.] Although cursory, this finding is correct, as the coroner did not provide any testimony regarding the injuries to the victim's face. [*See* RT 1170-1215.]

[21] As mentioned previously, the record does not support this factual finding. [*See* RT 1939-68.]

As concluded above, applying clearly established Supreme Court law as stated, *inter alia*, in *Smith, Chapman,* and *Navarro-Garcia*, petitioner was entitled to a new trial. Accordingly, the California Court of Appeal's decision denying relief was in error under clearly established federal law.

2) Clearly Erroneous Under AEDPA:

The state court's error only warrants habeas relief if it amounts to a decision that is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see also DePetris*, 239 F.3d at 1061. Thorough review of the trial record reveals that the Court of Appeal's decision is clearly erroneous, and is the result of an unreasonable determination of the facts in light of the evidence presented at trial. *Torres v. Prunty*, 223 F.3d 1103, 1007 (9th Cir. 2000); quoting 28 U.S.C. § 2254(d)(2) and *Williams v. Taylor*, 529 U.S. at 412-13.

To grant relief based on an unreasonable determination of the facts under § 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." *Torres*, 223 F.3d at 1108; quoting *Van Tran*, 212 F.3d at 1153-54. The presumption of correctness accorded to state courts' factual finding adheres to appellate as well as trial court determinations of fact. *See Cabana v. Bullock*, 474 U.S. 376, 387 n.4., 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), *abrogated on other grounds by Pope v. Illinois,* 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). To rebut this presumption, petitioner must show error by clear and convincing evidence *See* 28 U.S.C. § 2254(e)(1).

"[A] state court factual determination is unreasonable if it is so clearly incorrect that it would not be debatable among reasonable jurists." *Jeffries v. Wood,* 114 F.3d 1484, 1500 (9th Cir. 1997) (en banc), *cert. denied,* 522 U.S. 1008 (1997); *overruled on other grounds by Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). In the instant case, the Court of Appeal's factual error is so clearly incorrect that this court believes the determination would not be debatable among reasonable jurists.

The Court of Appeal found that petitioner "admitted he knew the victim was unarmed." [MTD, Ex. E 199.] However, review of the record reveals that petitioner *never admitted knowledge* that Daryl Smith was unarmed. Petitioner testified that even though he did not see a weapon in Daryl Smith's hands, petitioner purportedly believed he was in imminent danger of great bodily injury or death because Daryl Smith was charging at him and be believed that Daryl's friends, who had displayed knives earlier in the evening, were attacking him as well.[22]

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[22] Following are several excerpts of petitioner's description of the stabbing:

> Q: Okay. Now, at some point in time during that exchange of blows your head is down; is that right?
>
> A: Yes.
>
> Q: And you see people running at you?
>
> A: Yes.
>
> Q: You hear yelling?

(Continued on following page)

A: Yes.

Q: What do you do?

A: I was bending down while I was getting hit on both sides right here, (indicating), and then, umm, I had – first – well, okay. I was bending down getting hit, seen people running toward me yelling, get that fucker," like all kind of stuff, and I freaked out.

I pulled out my knife. I had opened it. I looked at him and I like pulled it out like this, (indicating) . . . [¶] I pulled it out with my left hand out of my pants and he was running towards me. I mean, he was still towards me. He swung and went over me and I thought maybe he got scared, you know, since I had the knife out and he just still came towards me and he had no reaction, so I stabbed him right here, (indicating), approximately two times.

[RT 1936-37.]

After the petitioner and Daryl fell to the ground, petitioner described the following:

A: . . . People were kicking me on the sides right here, (indicating), right here, and the head, (indicating).

Q: Okay. slow down.

A: Did you actually see people kicking you or did you fell [sic] contact to your left side of your body?

A: I just felt contact.

Q: Did you feel contact to your shoulder area as well?

A: Yes.

Q: Your left shoulder area?

A: Yes. All this side right here, (indicating), and a little bit of this side

Q: Did you feel contact to the left side of your head?

A: Yes.

[RT 1939.]

Petitioner's testimony regarding his reason for pulling the knife was as follows:

Q: Were you fearful at the time that you pulled the knife?

A: Yes.

(Continued on following page)

> Q: Is that why you pulled the knife?
>
> A: Yes.
>
> Q: When you pulled the knife, wasn't it your intent just to scare him?
>
> A: At first, but when he came toward me, I had to use it then because I don't know what he was going to do. He came right towards me and the fist went passed [sic] me.

[RT 1941.]

On cross examination, petitioner testified as follows:

> Q: Now, I'm going to focus you on Daryl. At any time that evening did you see any knives on Daryl?
>
> A: No, I did not.
>
> Q: At any time while you are fighting with Daryl does he ever reach for his pocket? [. . .]
>
> A: No, I did not see. I didn't really pay attention to him.
>
> Q: At any time when you are with Daryl does he – do you see any weapons in his hands?
>
> A: No, I did not. His fists were closed. I didn't see his hands.

[RT 1961-62.]

> Q: How did you open the knife?
>
> A: Like this, (indicating), with the left hand.
>
> Q: How did you open the knife?
>
> A: Two hands.
>
> [. . .]
>
> I went like this and like that, (indicating) because I was bent down when I saw people running and I was getting hit and I opened it up like this (indicating).
>
> Q: So there was a point of time where you stopped punching and you were just standing there?
>
> A: I wasn't even punching. I was standing there like this, (indicating), when I was getting hit. I couldn't punch when I was down. And then I saw people running.

[RT 1964-65.]

(Continued on following page)

Q: Now, say with this marker, show us how it is that you pulled the knife – if that was the knife show us how it is that you pulled it out of your pocket.

A: I just pulled it out like this, (indicating).

[. . .]

Okay. I was bending down like this and I saw people running and I went like this, (indicating), like that, and opened it up and he was standing toward me and I went like this because his fist was going there and I went like that and like that, (indicating), and then fell.

Q: He was charging you?

A: Yes, because I was a couple feet away because I went like this and like that, (indicating).

Q: You backed away?

A: I thought that he would see it and stop and get scared, but then he started running towards me again and I had to use it.

Q: Well, at that point he is the only person who has landed punches on you, correct?

A: Yes.

Q: And it is only his fists that are coming in contact with your body, correct?

A: At that time, yes.

Q: And he hadn't shown you any weapons prior to you going for the pocket, correct?

A: Correct.

Q: And once you pulled the knife out of the pocket and you opened it and then you see that fist coming at you, he didn't have any weapons in that hand, correct?

A: It was already out and then he started swinging.

Q: And he didn't have a weapon in that hand that was coming toward you, correct?

A: No.

Q: And he didn't have a weapon in the other hand that he was holding, correct?

A: Correct.

[RT 1967-68.]

petitioner was never asked whether he *believed* that, or *knew* whether, Daryl was unarmed. Therefore, the record provides clear and convincing evidence that the California Court of Appeal's factual determination was unreasonable. 28 U.S.C. §§ 2254(d)(2) and (e)(1).

In its analysis, the Court of Appeal "correctly identified the governing rule" (*Anthony*, 236 F.3d at 578), when it noted that the "presumption of prejudice [created by a finding of juror misconduct] also may be rebutted by this court's examination of the entire record to ascertain whether there is a reasonable probability of actual harm from the misconduct." [MTD, Ex. E 198.] However, relying on the factual error discussed above, the Court of Appeal conducted its prejudice analysis in a way that was objectively unreasonable.[23] *Anthony,* 236 F.3d at 578.

Considering petitioner's testimony in context, and in light of California law, it is clear that petitioner's testimony did not "demolish" or eliminate either self defense or imperfect self defense, as the Court of Appeal concluded. Nor were the defenses eliminated by any other evidence in the record, as recognized by the trial court in its decision to instruct the jury on self defense and imperfect self defense.[24]

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[23] Whether the constitutional error was harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d). *Garceau v. Woodford,* 275 F.3d 769 (9th Cir. 2001); citing *Lawson v. Borg,* 60 F.3d at 612.

[24] Under California law, "[a] trial court has no duty to instruct the jury on a defense – even at the defendant's request – unless the defense is supported by substantial evidence." *Curtis,* 30 Cal.App.4th at 1355; citing *People v. Flannel,* 25 Cal.3d 668, 684-85, 160 Cal.Rptr. 84 (1979).

(Continued on following page)

Because the Court of Appeal rested its conclusion solely on the "fact" that petitioner had "admitted that he knew" that Daryl was unarmed when he stabbed him, its conclusion was clearly erroneous. [*See* MTD, Ex. E 199.] Relying on its incorrect factual finding, the Court of Appeal essentially ignored petitioner's testimony in support of his self defense theories, and discounted all of the other trial evidence which supported these defenses.[25] Contrary to the Court of Appeal's finding, there is nothing

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"Substantial evidence in this specific context is defined as evidence which is sufficient to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist." *People v. Lemus*, 203 Cal.App.3d 470, 477, 249 Cal.Rptr. 897 (1988) (internal quotation marks omitted); citing *People v. Wickersham*, 32 Cal.3d at 324. In light of the foregoing authorities, the trial court's decision in the instant case to instruct the jury on self defense and imperfect self defense further indicates its finding that there was "substantial evidence" to support these defenses.

[25] The trial evidence of petitioner's fear and the aggressiveness of Daryl and his friends was not limited to petitioner's own testimony. Indeed, the testimony of several prosecution witnesses appeared to support petitioner's version of events. Isaac Valenzuela testified that: petitioner could have been afraid after the first fight; that Isaac sensed tension throughout the night; that Daryl was upset and initially did not want to make peace; that tempers were flaring during slam dancing; and that Brian Ritchie and Danny Smith were instigating further confrontation between Daryl and petitioners. [RT 491-93, 495, 496, 500, 593-94, 602, 623-24, 630, 950, 971-76, 1006-07, 1040, 1044, 1056, 1100, 1238, 1241-42 1264.] Scott Spindola testified that Daryl initiated the first fight by telling petitioner to "fuck off" then throwing a punch. [RT 1260-61.] James Molina's first impression of the first fight was that Daryl had started it. [RT 584.] Shannon Valenzuela testified that, at the start of the second fight, Daryl whistled as if "he wanted something to be done . . . like what are you going to do . . ." [RT 664.] Brian Cholewiak testified that Daryl was the aggressor in the second fight. [RT 2025-30.]

in the record that would foreclose self defense or imperfect self defense.[26]

"A state court's decision applying clearly established law is 'unreasonable' under AEDPA only when the court is left with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous – in other words that clear error occurred." *Brown*, 2002 WL 187415 at *4; citing *Van Tran*, 212 F.3d at 1153-54. After detailed consideration of the potential influence of the jury's misconduct in the instant case, the undersigned Magistrate Judge is left with a "firm conviction" that the California Court of Appeal's perfunctory harmless error analysis based on an incorrect determination of the facts was clearly erroneous under *Turner, Smith, Chapman,* and *Navarro-Garcia.*

This court finds a violation of 28 U.S.C. § 2254(d)(2) based on the California Court of Appeal's unreasonable factual determination that petitioner "knew the victim was unarmed" when he stabbed him. Furthermore, the court finds that the Court of appeal's harmless error analysis constituted an erroneous and unreasonable application of Supreme Court law in violation of 28 U.S.C. § 2254(d)(1).

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[26] Respondent's claim in her objections that the Magistrate Judge's findings are "not supported – and in several respects are contradicted – by the record taken as a whole," ignores the evidence clearly cited on pp. 57-59 n.12 and p. 62 n.17 of the original Report and Recommendation. [*See* Obj. pp. 36-38.] Respondent is correct that petitioner did not use the terms "imminent danger of death or great bodily injury." [Obj. pp. 35, 38.] Petitioner testified that he was "afraid" he was going to get seriously hurt. [RT 1941.] Such testimony constitutes evidence that petitioner thought he was in imminent danger of great bodily injury.

3) Brecht v. Abrahamson:

Despite the court's findings of constitutional violation, state court error, and entitlement to relief under AEDPA, petitioner is not entitled to federal habeas relief unless the error had a substantial or injurious effect or influence on determining the jury's verdict under *Brecht v. Abrahamson. DePetris*, 239 F.3d at 1061. In *Brecht v. Abrahamson*, the Supreme Court found that the harmless error standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), should be applied on review of federal habeas corpus petitions. "To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record." *Brecht*, 507 U.S. at 642; *Ghent v. Woodford*, 279 F.3d 1121, 1126-27 (9th Cir. 2002), *as amended* ___ F.3d ___, 2002 WL 372846 (9th Cir., Mar. 11, 2002). "The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place." *Id.* A reviewing court does not examine whether there was sufficient evidence to support the conviction in the absence of the constitutional error. *Ghent*, 279 F.3d at 1126, *as amended*; citing *Standen v. Whitley*, 994 F.2d 1417, 1423 (9th Cir. 1993). "Rather, regardless of whether there is sufficient evidence to support the conviction apart from the error, we must determine whether the error had a 'substantial and injurious effect or influence' on the conviction before us . . . " *Ghent, id.*

The Supreme Court explained the application of the substantial and injurious effect test in *Kotteakos*, as follows:

> if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Sassounian, 230 F.3d at 1111 (concluding that jury misconduct had a substantial and injurious effect on a special circumstance finding and granting habeas relief on that claim); citing *Kotteakos*, 328 U.S. at 765.

Here, the knife butt theory directly undermined petitioner's theories of self defense because petitioner's credibility was crucial to the jury's determination whether he believed himself to be in imminent danger of serious bodily harm at the start of the second fight with Daryl Smith. There was substantial evidence in the record indicating that petitioner acted in self defense – indeed, enough evidence to warrant instructing the jury on self defense and imperfect self defense. Therefore, it is possible that the jury could have found that petitioner acted in self defense.

Further, the evidence presented at the evidentiary hearing suggests that the jury considered the knife butt theory for a significant period of time and that it played a significant role in their ability to reach a verdict. Applying the "substantial and injurious effect" test as explained in *Brecht* and *Kotteakos*, this court cannot say with fair assurance that the jury's verdict was not substantially swayed by the introduction of extrinsic evidence into the juror's deliberations. *See Brecht*, 507 U.S. at 642-43; *Kotteakos*, 328 U.S. at 765. Based on all of the foregoing, the Magistrate Judge finds that the introduction of extrinsic evidence into the juror's deliberations more probably than not affected the verdict. Accordingly, petitioner is entitled to a conditional grant of a writ of habeas corpus as to this claim.

c. CD Experiment

Petitioner alleges that Juror Truelson conducted an experiment to see whether a CD would fit in a pants pocket, then reported the results to the jury. The evidentiary hearing testimony of jurors Gandy, Migliore, and to some extent, Truelson, as well as the testimony of investigators Stevens and Moore, indicate that the jury discussed during deliberations the results of a CD experiment conducted by Mr. Truelson.

"Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed 'extrinsic'." *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991); citing *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987). Mr. Truelson's discussion of the CD experiment during deliberations can be deemed extrinsic evidence constituting juror misconduct. However, the California Court of Appeal found the misconduct harmless because, although it touched on the issue of petitioner's credibility, the result of the experiment was that the CD fit in the pocket as petitioner had testified. Therefore, the appellate court reasoned that the extrinsic evidence could not have prejudiced the verdict. This court has some reservation as to the Court of Appeal's finding with respect to the actual effect of the extrinsic evidence on the jury's deliberations. Nevertheless, this hesitation does not approach a finding that the Court of Appeal's conclusion was erroneous and unreasonable, meriting relief under AEDPA. *Van Tran v. Lindsey*, 212 F.3d 1143, 1150-53 (9th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000).

2. Discussions Outside of Deliberations

Petitioner asserts that jurors Truelson and Schifferli committed misconduct when they discussed trial evidence outside of deliberations.[27] Specifically, at some point before Mr. Schifferli was excused from jury service, Mr. Truelson and Mr. Schifferli allegedly discussed testimony regarding a pager. In addition, the two jurors allegedly had at least one telephone conversation in which they discussed the deliberations process before the jury had reached its verdict.

The evidence presented supports a finding that the foregoing conversations occurred, and that they constitute juror misconduct. However, given that the evidence discussed did not relate to an ultimate issue in petitioner's case, and that the conversations appear unlikely to have influenced juror Truelson, the misconduct was harmless.

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[27] Petitioner's assertions based on Ms. Gandy's testimony should be rejected in light of her vagueness. At the evidentiary hearing, Ms. Gandy admitted that she had not actually heard discussions of evidence outside of deliberations. Nor could she identify which jurors had such conversations or the evidence they discussed.

Accordingly, the California Court of Appeal's denial of this claim was a reasonable application of federal law.

3. Juror Truelson's Allegedly False Answers on Voir Dire

Petitioner claims that Don Truelson answered falsely on voir dire with regard to two topics. First, Mr. Truelson allegedly failed to reveal that he had a friend in law enforcement by the name of Vic Lupu. Second, Mr. Truelson allegedly failed to disclose that he knew Bob Pinckard, one of the witnesses at trial.

For petitioner to be entitled to habeas relief, he must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenging for cause."[28] *Dyer v. Calderon*, 151 F.3d 970, 986 (9th Cir. 1998); citing *McDonough Power-Equipment v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

The California Court of Appeal found that Mr. Truelson had not misstated the facts with regard to knowing Bob Pinckard or having a friendship with Vic

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[28] Under California law, a challenge to a prospective juror may be made for cause, for one of the following reasons: general disqualification; implied bias; or actual bias. Cal. Code of Civ. Pro. § 225(b)(1). "Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." *Nesler*, 16 Cal.4th at 581; citing Cal. Code of Civ. Pro. § 225(b)(1)(C); *People v. Wheeler*, 22 Cal.3d 258, 273-74, 148 Cal.Rptr. 890 (1978).

Lupu. In the instant proceeding, a substantial amount of evidence was received with regard to both of these issues. Thorough review and consideration of this evidence leads this court to find that the state court's conclusion was reasonable.

The evidence indicates that Vic Lupu and Don Truelson were merely acquaintances. Even if they were friends, Detective Lupu had no involvement with petitioner's case. Thus, there is no indication that a friendship between the two would have provided the basis for a challenge for cause under California law.

As to whether Mr. Truelson knew Bob Pinckard, the only suggestion that he may have known this witness was the comment made to investigator Moore that Mr. Truelson "didn't think that was going to be Bob Pinckard." Despite a significant amount of testimony related to this issue, none of it evidenced that Don Truelson knew Bob Pinckard.

In light of the evidence presented at the evidentiary hearing, this court does not find the state court's rejection of this claim contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d).

4. Consideration of Penalty and Punishment

Petitioner contends that during deliberations Mr. Truelson stated that "manslaughter" was "too easy" for taking someone's life. He further alleges that juror Gandy stated that the jurors seriously discussed penalty and punishment. During this federal habeas corpus proceeding, petitioner has presented no admissible evidence to support this claim. Assuming, *arguendo*, that discussions of penalty did occur, there is no indication that an extraneous information was introduced in this regard. Nor is there any indication of prejudice. Accordingly, there is no basis on which to find the California Court of Appeal's rejection of this claim unreasonable.

B. JUROR BIAS

Based on numerous instances of juror misconduct, petitioner contends that Mr. Truelson was biased. These instances of misconduct include: conducting an experiment with a CD and discussing the results during deliberations, providing allegedly dishonest answers on voir dire, failing to follow the court's admonishments not to discuss the case outside of deliberations, and discussing penalty and punishment during deliberations.

The existence of juror bias may violate a defendant's Sixth Amendment right to a fair and impartial jury. *Bayramoglu v. Estelle*, 806 F.2d at 888; citing *United States v. Eubanks*, 591 F.2d 513, 516-17 (9th Cir. 1979). "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *People v. Nesler*, 16 Cal.4th 561, 580, 66 Cal.Rptr.2d 454 (1997); citing *United States v. Wood*, 299 U.S. 123, 145-46, 57 S.Ct. 177, 81 L.Ed. 78 (1936). "'The theory of the law is that a juror who has formed an opinion cannot be impartial.' [citation omitted] [¶] It is not required, however, that the jurors be totally ignorant of the facts and issues involved . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Irvin v. Dowd, 366 U.S. at 722-23. "[L]ight impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but . . . those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." *Nesler*, 16 Cal.4th at 468; citing *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244 (1878).

The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000); citing *Dyer*, 151 F.3d at 973 n. 2; *see also United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000).

As discussed above, the evidence does not support a finding that Mr. Truelson provided dishonest answers on voir dire. Nor is there admissible evidence to indicate that Mr. Truelson discussed penalty and punishment during deliberations.

Nevertheless, even assuming the truth of all of petitioner's allegations of misconduct with respect to juror Truelson, the record evidence does not support a finding of bias. The evidence does indicate that Mr. Truelson did not follow the court's admonishments and committed several instances of misconduct. However, when thoroughly reviewed, there is nothing to indicate that Mr. Truelson had an "agenda" with respect to petitioner's trial. The evidence demonstrates that Mr. Truelson failed repeatedly to follow the court's instructions, but it does not indicate that Mr. Truelson had an impartial state of mind. Accordingly, there is no support for a finding of bias.

C. TRIAL COURT ORDER TO STOP INVESTIGATION OF JUROR MISCONDUCT CLAIMS

Petitioner contends that the trial court violated his right to due process by ordering him to stop investigating juror misconduct claims and by failing to hold an evidentiary hearing on those claims. To the extent that petitioner asserts a violation of state law, federal habeas relief is not available for a state court's alleged error in interpreting or applying state law. *Estelle v. McGuire*, 502 U.S. at 67-68; *Bonin v. Calderon*, 77 F.3d 1155, 1161 (9th Cir.), *cert. denied*, 516 U.S. 1143 (1996) (no federal habeas relief for state law error not amounting to denial of federal constitutional right).

Under federal law, however, a court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances. *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998); citing 28 U.S.C. § 2254(d)(3) (1994); *Remmer v. United States*, 350 U.S. 377, 379, 76 S.Ct. 425, 100 L.Ed. 435 (1956); *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Due process requires only that all parties be represented, and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality. *See Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982). So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness. *Dyer*, 151 F.3d at 974; citing *Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990).

In the instant case, petitioner's trial counsel filed a motion for a new trial, raising his juror misconduct claims and submitting an investigator's report and the declaration of juror Gandy. [CT 192-242.] The prosecution opposed the motion and petitioner's request for an evidentiary hearing. [CT 244-60.] The court ordered petitioner to stop contacting jurors. [CT 243.] After continuing the hearing so that the court could review the authorities cited by the parties, the trial court denied petitioner's motion. [CT 262.] Based on this record, there is no indication that the proceeding on petitioner's motion violated due process. The California Court of Appeal's finding with respect to petitioner's request for an evidentiary hearing does not appear to be an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). Accordingly, this claim should be denied.

VIII. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) conditionally granting the Petition, releasing petitioner from custody, and discharging him from all other adverse consequences of his conviction in state court case number KA021224, unless the State of California elects to retry petitioner within a reasonable period of time.

DATED: March 15, 2002

/s/ Stephen J. Hillman
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE
JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections (as provided in the Local Rules Governing the Duties of the Magistrate Judges), and to review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX C

Opinion of the California Court of Appeal
filed September 30, 1996

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN STINSON, Defendant and Appellant.	B092528 (Super. Ct. No. KA021224) (Filed Sep. 30, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clarence A. Stromwall, Judge. Affirmed.

Bruce Daniel Rosen for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Jaime Fuster and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Brian Stinson appeals from a judgment of conviction entered after a jury found him guilty of second degree murder (Pen. Code, §§ 187, subd. (a), 189) during which he personally used a knife (*id.*, § 12022, subd. (b)). The trial court denied defendant's motion for a new trial, after which he was sentenced to state prison for the term prescribed by law.

STATEMENT OF FACTS

Dale Perry held a bachelor party in Covina for Bob Pinckard (Pinckard) on the evening of February 12, 1994; Pinckard was to marry Nichole Savage (Savage) the following week. There were 20 to 30 invited guests, among whom were defendant, Daryl Smith, Danny Smith, Isaac Valenzuela, Scott Spindola (Spindola), Chad Price (Price), Brian Ritchie (Ritchie) and James Molina (Molina).

There was a keg of beer in the back yard; this led to a good deal of drinking. In addition, Danny Smith had drunk several beers before arriving at the party. A number of the guests were armed with knives. Defendant showed his knife to Spindola, who displayed his knife in turn, as did Price and possibly three or four other guests. Those attending the party were New Generation Skinheads, Covina Skinheads and surfers.

Two strippers arrived to entertain the guests at approximately 10:15 p.m. They performed in the garage in which a stage setting and seating had been prepared. The 25 to 30 male guests then in attendance crowded into the garage to see the show; they became quite boisterous. The strippers had told the audience to put money on the bachelor or on themselves, after which the strippers would remove it. Guests were throwing money towards Pinckard, but often aimed short. As a consequence, money fell to the floor regularly.

After Isaac Valenzuela picked up a dollar and placed it on Pinckard, Daryl Smith picked up some money;

immediately after he did so, a stripper came by and took it. Suddenly, defendant struck at Daryl Smith, who then struck back. While defendant and Daryl Smith each threw a number of punches, they were basically flailing at each other. After approximately 10 to 15 seconds, Daryl Smith began to fall backward; this created a lull in the combat.

Isaac Valenzuela and Danny Smith took Daryl Smith outside so he could gain control of his temper; Molina and Ritchie accompanied them. Daryl Smith's left eye appeared red and swollen; he was quite angry at being attacked in that fashion. His friends and family reminded him that people had been drinking and things happen in those circumstances; since this was a friend's bachelor party, he should calm down and put the matter behind him. After some heated discussion, Daryl Smith finally agreed that he should calm down and let go of the incident.

Isaac Valenzuela then approached defendant and introduced himself. He explained that Daryl Smith was his very good friend; he did not need to hear defendant's reason for the assault, but he wanted assurance that there would not be any further trouble. Defendant said he did not want any trouble, whereupon Isaac Valenzuela shook his hand. He then asked defendant to apologize to Daryl Smith; defendant agreed and shook hands with Daryl, who still seemed quite upset. Defendant's manner and tone seemed snide rather than sincere to some bystanders.

Despite these peacemaking efforts, the incident could not be laid to rest. The party guests separated into two groups, one clustered about defendant and the other about Daryl Smith. Both groups made snide remarks referring to the opposite group's center of attention. Given the amount of this directed at the group around Daryl Smith, Isaac Valenzuela began to feel quite uncomfortable. To the best of his knowledge, no one in that group had a knife, while a number of the others were armed. Valenzuela drank little after the fight in the garage; he made sure that Daryl Smith had nothing more to drink.

There had also been a bachelorette party for Savage that evening. Shortly after 11:00 p.m., Savage, Shannon Valenzuela, defendant's girlfriend and several other women from that party arrived at the bachelor party. Shannon Valenzuela noticed that Daryl Smith had a black eye. She talked to him about what had happened; he did not seem angry. Isaac Valenzuela told Shannon he had a bad feeling about what had happened and wanted to leave the party. They did not leave immediately, however, remaining with Daryl Smith's group for approximately one-half hour.

After the women arrived, a number of guests began slam dancing; they did so in a very aggressive fashion. There was a certain tension in the air. The Valenzuelas, the Smith brothers, Ritchie and Vanessa Silva (Silva) left the party briefly, then returned. A short time later, Ritchie, Silva and the Smith brothers were ready to leave. As they stood out front, Danny Smith invited the Valenzuelas to his house. Daryl Smith appeared calm.

After he was halfway inside an automobile, Daryl Smith stepped out and walked back toward the party. The others joining him to say good-bye to their host. Defendant and a friend were walking approximately six feet in front of Daryl Smith and Shannon Valenzuela; defendant had his hands in his pockets. Suddenly, defendant turned around, moved toward Daryl Smith and struck at him with his fists. Daryl blocked the initial blow, then retaliated. The two men exchanged blows to the chest, after which defendant lunged at Daryl Smith. Daryl lost his balance; both men fell to the ground. Inasmuch as defendant appeared to have the advantage, Shannon Valenzuela kicked him and told him to leave Daryl Smith alone. No one else was near the two combatants.

Eventually, people pulled the two apart; Daryl Smith scooted away from defendant, after which Shannon Valenzuela and Savage helped him up. He appeared to be winded and frightened, but otherwise all right. Savage felt moisture on Daryl's chest; she realized he was bleeding and had been stabbed. Defendant and his companion had disappeared.

It rapidly became clear that Daryl Smith had been wounded very seriously; he was covered with stab wounds. Someone summoned the police and paramedics. Daryl Smith died shortly after they arrived.

Defendant told some of his relatives and friends that he had stabbed someone; he showed a blood-stained knife to his girlfriend. Later that night, defendant's girlfriend gave the blood-flecked knife to his uncle. Defendant's grandmother then informed the police that he would to surrender to them; he did so shortly after 9:00 a.m. on February 13, 1994, at which time his uncle gave the knife to the police.

Daryl Smith had been stabbed 10 times. Three of the wounds were to the chest area. One wound cut into the liver; another cut into the heart. The third chest wound pierced the stomach. Many of the other wounds were defensive wounds; they were not life-threatening. The wounds all could have been inflicted by defendant's knife.

Defense

Defendant carried a knife for protection. At least three other party guests were armed with knives.

During the stripper show, defendant threw two dollar bills onto the floor for the strippers. The money landed in front of Daryl Smith; he picked up the money and put it in his pocket. Defendant tapped Daryl on the shoulder and said the money belonged to him. They then exchanged blows.

Defendant extended his hand to Daryl Smith and apologized, but Daryl refused to shake hands. One of Daryl Smith's companions told defendant they would finish the matter later. Defendant became frightened. Isaac Valenzuela then became involved; he induced Daryl Smith to shake defendant's hand.

There was some tension in the air afterward, however; it appeared Danny Smith and some others had plans for defendant. He was scared. After the women arrived, the atmosphere appeared to clear; he thought everything was all right then.

Defendant and Paul Krugman (Krugman) walked to defendant's automobile to get a compact disc; Daryl Smith and some others were standing near another automobile. Defendant heard a whistling noise; as he and Krugman walked back to the party, Shannon Valenzuela said, "That's him." Someone struck defendant in the head from behind; he fell forward, then turned to see Daryl Smith's fist descending toward him. Defendant began striking at Daryl, who had the advantage. Defendant became frightened; he was afraid that people behind him would jump him, causing him serious injury.

Defendant took his knife from his pocket and opened it. He hoped to frighten Daryl Smith, but Daryl, who was unarmed, did not retreat. Defendant stabbed at Daryl Smith twice, aiming for the chest area, after which the two of them fell to the ground; Daryl was on top. Defendant continued to hold the knife as they rolled around; people kicked him. He did not stab Daryl Smith in the back or buttocks.

Once people intervened to break up the fight, defendant left immediately. He told his friends that he stabbed Daryl Smith. When he learned Daryl had died, he asked his grandmother to arrange for his surrender to the police.

CONTENTIONS

I

Defendant contends the trial court erred in denying his motion for a new trial, in that he clearly established the existence of juror misconduct.

II

Defendant asserts the trial court committed various instructional errors.

DISCUSSION

I

Defendant contends that trial court erred in denying his motion for a new trial, in that he clearly established the existence of juror misconduct. While we agree there was misconduct, none of it was prejudicial.

Whenever a party moves for a new trial based upon juror misconduct, the trial court must ascertain whether the evidence submitted in support of the motion is admissible under Evidence Code section 1160, subdivision (a), and then consider whether the facts establish misconduct. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 255-256.) While juror misconduct generally "'raises a presumption of prejudice,'" the presumption "'may be rebutted by proof that no prejudice actually resulted.'" (*In re Hitchings* (1993) 6 Cal.4th 97, 118.)

Evidence Code section 1150, subdivision (a), permits the receipt of evidence to impeach or support a jury verdict "as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. [However, n]o evidence is admissible to show the *effect* of such statement, conduct, condition, or event upon a juror either in influencing him to assent or dissent from the verdict or concerning the mental processes by which it was determined." (Italics added.) Evidence of statements made in the jury room thus will be inadmissible if the statements are only "a verbal reflection of the juror's mental processes." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) To be admissible, therefore, statements made in the jury room must reflect the nature and course of jury deliberations (*People v. Chaney* (1988) 202 Cal.App.3d 1109, 1121) or in themselves evidence misconduct. (*Hedgecock, supra*, at p. 419.) Accordingly, while evidence an individual juror privately "considered" a matter appears to concern that juror's mental processes and thus to be inadmissible (*Krouse v. Graham* (1977) 19 Cal.3d 59, 81), evidence the jury as a whole discussed and considered a matter is an objectively verifiable fact subject to corroboration and thus would be admissible (*id.* at pp. 80-81).

Inquiry into the validity of the jury's verdict also may be based on "any otherwise admissible evidence . . . received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) It is now well settled, however, that "'"a jury verdict may not be impeached by hearsay affidavits." [Citations.'] [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 697; *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1670-1671.) To the extent a motion for a new trial is based on such incompetent evidence, it properly is denied for lack of evidentiary support. (*Ibid.*)

Defendant acknowledges that much of the evidence submitted in support of his motion for a new trial is incompetent hearsay found in a defense investigator's report of jurors' statements to him. He argues the admissibility of these statements, relying on a case which does not discuss Evidence Code section 1150, subdivision (a), and conflicts with subsequent Supreme Court decisions. As the appellate court recognized in *Burns v. 20th Century Ins. Co., supra*, we are bound by the latter authority and may not rely on a conflicting appellate decision. (9 Cal.App.4th at p. 1672.)

Defendant additionally argues that if the trial court could not consider the hearsay statements, the court erred in failing to grant a motion he made for an evidentiary hearing on the matter. While the court has discretion to hold an evidentiary hearing to examine allegations of juror misconduct, a defendant is not entitled to such a hearing as a matter of right. An evidentiary hearing is justified only where the moving party has presented evidence demonstrating a strong possibility that prejudicial misconduct has occurred; even then, a hearing generally will be justified only when the parties' evidence is materially in conflict. (*People v. Cox*, *supra*, 53 Cal.3d at pp. 697-698.) Defendant has not met either condition; he thus was not entitled to an evidentiary hearing.

Defendant identifies several categories of misconduct. We examine these in turn, disregarding all statements of jurors' subjective reasoning or thought processes.

Discussion of Extraneous Matter

" 'Evidence obtained by jurors from sources other than in court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby. [Citation.]' [Citation.]" (*People v. Cox*, *supra*, 53 Cal.3d at pp. 696-697.) In *People v. Marshall* (1990) 50 Cal.3d 907, one juror told other jurors during deliberations that he had a law enforcement background and stated extraneous and erroneous legal principles. The court found this to be misconduct giving rise to a presumption of prejudice, but noted that "[t]he jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." (*Id.* at p. 950.)

The introduction of extraneous matters to deliberations therefore requires reversal of the judgment only when "'the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.' [Citations.] . . . [¶] 'The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, an objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror.' [Citation.]" (*People v. Marshall*, *supra*, 50 Cal.3d at pp. 950-951.) The presumption of prejudice also may be rebutted by this court's examination of the entire record to ascertain whether there is a reasonable probability of actual harm from the misconduct. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 119.)

"To summarize, when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test." (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) In such a case, the "'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict." (*Id.* at p. 654.)

Lloyd Z. told the investigator that a juror, whom he believed was a woman, pointed out to other jurors that the cut above the victim's eye, received in the first fight, could have been made by a knife held in the hand when the blow was delivered. The juror pointing this out said she had been an emergency room nurse. " She explained that the cut could have been made when the defendant's clenched fist made contact with the victim's face, while holding the knife, with the blade of the knife sticking up between his thumb and forefinger, and the butt of the knife protruding from the bottom of the hand. . . . She told the rest of the jury that the cut was 'too clean' to be a cut from defendant's fist, but believed that this was a cut resulting from the butt of the knife striking the victim's face." Don T. also told the investigator that one juror "did bring up the fact that she believed the knife was in the defendant's hand during the first fight because of the cut on the victim's head." As noted *ante*, these statements are hearsay and, therefore, incompetent and insufficient to impeach the jury's verdict. (*People v. Cox, supra*, 53 Cal.3d at p. 697;

Burns v. 20th Century Ins. Co., supra, 9 Cal.App.4th at pp. 1670-1671.)

Joan G. declares that one juror, a nurse by profession, explained that the cut near the victim's eye could not have been made by a fist. She said she had seen cuts and bruises in the past as a nurse. In her opinion, this cut was made by the butt of the knife making contact with the eye area. In addition, this juror gave a medical explanation of how the victim's knife wounds could have been made by defendant's knife. This explanation went beyond the coroner's testimony.

The victim received the black eye and the cut above his eye in the first fight he had with defendant. If the cut necessarily was caused by a knife, then it may be inferred that he had his knife in his hand during the first fight. The question remains whether that inference is prejudicial to defendant.

The second fight occurred 45 minutes or more after the first fight. Defendant admitted he stabbed the victim repeatedly, aiming for the chest area. He admitted he knew the victim was unarmed. With those admissions, both self-defense and imperfect self-defense fly right out the window – even if the victim was the aggressor. With those claims demolished, the least offense of which defendant could have been convicted is the one of which he was convicted, second degree murder. Under an objective standard, therefore, a conclusion that he had the knife ready in his hand during the first fight could not have affected the outcome of the case. The misconduct was not prejudicial. (*In re Carpenter, supra*, 9 Cal.4th at pp. 653-654.)

Discussions with Nonjurors or Predeliberation Discussions with Jurors

As noted in *In re Carpenter, supra*, it is improper for a juror to discuss matters outside the record or to discuss the case with nonjurors. (9 Cal.4th at p. 647.) It is equally improper for jurors to discuss the case among themselves before deliberations. (*In re Hitchings, supra*, 6 Cal.4th at p. 118.)

William S. told the investigator that he had several discussions with Don T. about " 'things going on in the jury,' " but he could not remember the content of the conversation. He telephoned Don T. several times after he was excused, pursuing his interest in the case. Don T. gave him updates on how the case was going; he was told of " 'problems' they were having with Mrs. G. He was told . . . 'tempers were flaring' and the jurors were arguing with Mrs. G." In addition William S. and Don T. did have a conversation about the pager; they discussed something to do with the numbers on the pager. Don T. acknowledged to the investigator that he discussed the case with William S. on the telephone, but remembered talking to him after the case was over. He did not remember talking to William S. prior to that. As noted *ante*, these hearsay statements may not be considered to impeach the jury's verdict. (*People v. Cox, supra*, 53 Cal.3d at p. 697; *Burns v. 20th Century Ins. Co., supra*, 9 Cal.App.4th at pp. 1670-1671.)

Douglas Abell signed a letter stating he overheard William S. and Don T. discussing the number on the beeper. One stated the number was that of Jenn, or Jenny, the defendant's girlfriend. Assuming arguendo that Abell's unsworn statement may be considered, it adds little. Even if we were to consider all of this evidence, it would not establish the existence of prejudicial misconduct.

It appears the conversations Don T. and William S. had after William S. was excused were gossip concerning the jury and the course of jury deliberations. There is no indication they discussed the evidence presented or their impressions of that evidence. While it was misconduct for Don T. to discuss the case with William S. at all after William S. was dismissed, gossiping about the jurors and their deliberations does not demonstrate bias. Considering the entire record, with particular attention to the strength of the evidence against defendant, the conversations appear to have been trival; there is no substantial likelihood Don T. was influenced by the conversations. (*In re Hitchings, supra*, 6 Cal,4th at p. 119.) With respect to the beeper conversation, this collateral and uncontested matter had no conceivable bearing on defendant's guilt or innocence. Again, the presumption of prejudice has been rebutted by the nature of the conversation and the strength of the evidence against defendant. (*Ibid.*)

Joan G. declared that "[d]uring the trial, I had the impression that the other jurors were talking about the testimony being presented, before the case [went] to the jury. During the jury deliberations, I had the impression that certain jurors were discussing the case outside of the jury deliberation room. I felt this because there were comments made by the other jurors about things that were previously discussed, when I know they had not been discussed in my presence."

Joan G. purportedly had told the investigator that she overheard Don T. and Bruce M. discussing Michele Leyva's testimony before the case was given to the jury.

She did not include this incident in her declaration, apparently unwilling to state under penalty of perjury that this conversation occurred. The statement therefore may be disregarded as unreliable. The balance of John G.'s statements are too vague and based too firmly on her subjective impressions and thought processes to be evidence of misconduct.

False Voir Dire Answers

A criminal defendant has a constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution to trial by a fair and impartial jury. A vital factor in ensuring this right is the use of voir dire to question prospective jurors and ascertain those who hold actual biases and those who may be suspected of harboring them. The fairness of the jury is ensured through the fully informed exercise of challenges for cause and peremptory challenges. (*In re Hitchings, supra*, 6 Cal.4th at pp. 110-111.) Inasmuch as false answers on voir dire eviscerate the right to challenge a juror, one giving such answers commits misconduct that undermines the very jury selection process. (*Id.* at p. 111.)

Don T. was asked on voir dire whether he knew any of the named witnesses and whether he had any friends or relatives in law enforcement. He answered both questions negatively. When asked whether he knew witness Bob Pinckard before the trial, Don T. told the investigator that when Pinckard walked in, he "'didn't think that was going to be Bob Pinckard.'" He said he did not know any of the witnesses that were called to testify, which surprised him, in that they all lived fairly close to him. When asked whether he knew Vic Lupu, one of the police officer witnesses, he said Lupu was his "'good buddy.'"

Officer Lupu told the investigator that he met Don T. when their daughters were playing softball. He knows Don T. well enough to say "hello" when they meet and carry on general conversation, most of which is about baseball. In other words, he knows Don T. by name and sight. He has never socialized with him. He believes Don T. knows he is a police officer.

Lisa T., Don T.'s daughter, and Crystal Pinckard, Bob Pinckard's sister, told the investigator that they knew each other casually from school. They were never true friends. Lisa T. said she did not know Bob Pinckard. Crystal Pinckard said her brother did not know Lisa T.; to the best of her knowledge, Lisa and Bob never dated. April Torrance told the investigator that Crystal Pinckard and Lisa T. were good friends in high school and "'hung out'" with her. She remembers Lisa T. telling her Bob Pinckard was at some of the parties Lisa attended.

As noted *ante*, inasmuch as these statements are hearsay, they are incompetent and insufficient to impeach the jury's verdict. (*People v. Cox, supra*, 53 Cal.3d at p. 697; *Burns v. 20th Century Ins. Co., supra*, 9 Cal.App.4th at pp. 1670-1671.) Even if the statements were to be considered, however, they would not demonstrate the existence of prejudicial misconduct.

Don T.'s statement that Officer Lupu was his "good buddy" must be considered in context with the statement of Officer Lupu himself. When so considered, it is clear that Officer Lupu and Don T. were the most casual of acquaintances. They did not socialize; they were not friends. Accordingly, Don T. did not misstate the facts when he said on voir dire that he had no *friends* in law enforcement -

There is *no* evidence Don T. knew the witness, Bob Pinckard – even if one may infer that his daughter, Lisa, did know this person. At most, Don T.'s statement to the investigator suggests he knew *of* Bob Pinckard and was surprised when this witness came into the courtroom, thinking Bob Pinckard was someone else. Consequently, there is no evidence Don T. misstated the facts when he said on voir dire that he did not know any of the witnesses.

Joan G. declares that "[d]uring the deliberations, I formed the opinion that Mr. T[.] knew somebody involved in the prosecution's case. I based this conclusion on the way he handled himself in the jury room. It was as if he had a personal agenda and wanted a conviction at any cost." Once again, these statements are too vague, grounded too firmly in Joan G.'s subjective impressions and thought processes, to qualify as evidence of misconduct.

Extrajudicial Experiments or Other Extraneous Matter

As noted *ante*, it is misconduct for a juror to obtain information from any source other than the trial itself. (*People v. Cox, supra*, 53 Cal.3d at pp. 696-697.) Don T. told the investigator that he "had some problems with [defendant's] statement on the stand, that referred to him going to his car and getting a CD [compact disc] from the car and putting it in his back pocket. [Don T.] did not believe that a CD would fit in the back pocket of his pants, so he went home and measured a CD and tried to put it in his pants pocket. [Don T.] noticed that it could possibl[y] be done, but would be an extremely right fit." While these hearsay statements must be disregarded, Joan G.'s declaration largely provides the same information. She declares that "[d]uring the deliberation process, Mr. T[.] told the rest of the jury about measuring and trying to put a CD into his back pocket. He relayed to us that he did this experiment at his home and putting a CD into his back pocket was a tight fit."

It clearly was misconduct for Don T. to perform this experiment and to report the results to the other jurors. As defendant notes, while touching on a collateral matter, this test of his testimony bore directly on his credibility. It was not harmful to his credibility, however. Don T. ascertained that a compact disc could fit in a man's rear trousers pocket. The misconduct therefore was not prejudicial. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 119.)

Discussions of Penalty or Punishment

It is misconduct for jurors to disregard the court's instruction not to discuss penalty or punishment. (*People v. Hill* (1992) 3 Cal.App.4th 16, 34.) In assessing the prejudicial effect of the misconduct, we apply an objective standard which emphasizes "the nature and extent of the alleged misconduct. . . . [O]ur concern is with the misconduct itself and whether it is 'inherently likely' to have influenced a reasonable juror." (*Id.* at p. 35.)

Joan G. declares that "[t]here were discussions of penalty and punishment in the jury deliberation room amongst the jurors. These were discussions of what would, or could, happen to [defendant] if we were to convict him of certain crimes." She purportedly had told the investigator that "'chit chat'" over punishment included a discussion of the death penalty, including the possible methods of execution. Life imprisonment without the possibility of parole also was discussed. Joan G. did not repeat these specifics in her declaration. Inasmuch as she apparently was unwilling to swear to these details under penalty of perjury, we may disregard them as unreliable. Even if we were to consider these details, however, they would not change the analysis.

Penalty discussions based upon the jurors' own beliefs, suspicions or speculations may be distinguished in their prejudicial impact from discussions based upon authoritative outside information. (*People v. Hill, supra*, 3 Cal.App.4th at p. 36.) Jurors necessarily bring general knowledge and beliefs to deliberations. (*Ibid.*) As the court notes, "it is the rare juror indeed who does not suspect a defendant in a personal injury action is insured for any recovery awarded. It is also rare for jurors not to have some preconceived, and possibly ill-conceived, notion of the penalty associated with a particular crime. . . . [W]hen a juror disregards an instruction and introduces these matters into the jury's deliberations . . . prejudice depends upon the nature and source of the information as well as how the information relates to the issues at hand." (*Id.* at pp. 36-37.)

In assessing the nature and source of penalty information, we must remember that "statements regarding legal issues carry greater weight, and hence are more likely to prejudice the verdict, when they come from a juror trained in the law [or from a similarly trained outside source]." (*People v. Hill, supra*, 3 Cal.App.4th at p.

37.) In contrast, when, as here, the references to penalty are speculative only and involve a matter not material to the issues presented to the jury, the misconduct is more analogous to the improper consideration of whether the defendant has malpractice insurance in a medical malpractice action. (*Ibid.*) In the instant matter, as in *Hill*, the discussions of penalty appear to have been isolated and infrequent, the evidence does not suggest the jurors reached any agreement to base their verdict on the improper information, and there is no competent evidence penalty was considered rather than simply discussed. (*Id.* at pp. 37-38.) There is no evidence the information was represented or presented as authoritative. (*Id.* at p. 38.) In these circumstances, the misconduct was not inherently likely to have affected the vote of any juror and, therefore, was not prejudicial. (*Ibid.*)

Don T. told the investigator he did not want to vote for manslaughter, because manslaughter was too "'easy'" for taking someone's life. This is a statement of Don T.'s beliefs or subjective reasoning processes, not the improper discussion of penalty or punishment, and therefore is inadmissible quite apart from its hearsay status. (Evid. Code, § 1150, subd. (a).)

To summarize, the record discloses some incidences of misconduct. Whether considered singly or together, however, these incidences were not prejudicial. The trial court therefore did not err in denying defendant's motion for a new trial.

II

Defendant asserts the trial court committed various instructional errors. The assertion lacks merit.

CALJIC Nos. 5.12 and 5.17

These instructions pertain to self-defense and imperfect self-defense. As given to the jury, CALJIC No. 5.12 lists the elements that a person must "*honestly* and reasonably believe[ ]" for the killing to have been in self-defense. (Italics added.) CALJIC No. 5.17 informs the jury that one "who kills another person in the *honest* but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but . . . is not guilty of murder." (Italics added.) Both instructions were revised in 1994, changing "honestly" and "honest" to "actually" and "actual." Defendant argues it was prejudicial error for the court to give the outmoded versions of these instructions.

The revisions were based on language in *In re Christian S.* (1994) 7 Cal.4th 768. In reconsidering the doctrine of imperfect self-defense, the Supreme Court noted, "Although [past] opinions referred to an 'honest belief' we shall use the more precise term '*actual belief* because it avoids the confusing suggestion inherent in the phrase 'honest belief' that a person could have a 'dishonest belief,' i.e., that a person could believe something he does not believe." (At p. 773, italics in the original.) While the court characterizes as "confusing" the suggestion that one could have a "dishonest belief," a more accurate term would be "illogical." This, assuredly, is what the court meant.

Added precision in the language used to instruct juries certainly is desirable, but the lack of it is not necessarily prejudicial. In deciding a claim of instructional error, this court must determine how a reasonable juror would have understood the instruction. (*People v. Warren* (1988) 45 Cal.3d 471, 487.) We must assume the jurors are intelligent and capable of correlating and interpreting the instructions correctly. (*People v. Lonergan* (1990) 219 Cal.App.3d 82, 91-92.) Accordingly, reversal is required only when an instruction is likely to have misled the jury. (*People v. Gates* (1987) 43 Cal.3d 1168, 1193, certiorari den. (1988) 486 U.S. 1027.)

Intelligent, capable jurors would recognize the illogic inherent in the suggestion that one may believe something one does not believes and, therefore, may have a "dishonest belief" in something. As did the court in *Christian S.*, jurors therefore would interpret the requirement that the defendant hold an honest belief as meaning he must have an actual belief. In that event, the jurors would not have been mislead. Inasmuch as the failure to use the language of the 1994 revisions of the instructions is not likely to have misled the jury, the error is harmless. (*People v. gates, supra*, 43 Cal.3d at p. 1193.)

Failure to Define "Imminent"

The instructions on self-defense and imperfect self-defense given the jury include the requirement that the danger to the actor must have been "imminent." The 1994 revisions of CALJIC Nos. 5.12 and 5.17 define "imminent" as danger that is "apparent, present, immediate and instantly dealt with, or . . . so appear[ing] at the time to . . . a reasonable person," or use this definition in lieu of the requirement that the danger have been "imminent." As defendant sees it, the failure to so define "imminent" was prejudicial error. Defendant did not request the 1994 revisions of these instructions or make any other request that the word "imminent" be defined more precisely.

When an instruction is a correct statement of law and its only flaw is perceived to be insufficient detail or a lack of specificity, the party asserting the flaw has a duty to request the detail or specificity he deems necessary; the failure to do so waives any claim of error on appeal. (*People v. Burrows* (1968) 260 Cal.App.2d 228, 230.) A trial court has a duty to instruct the jury on the meaning of a phrase even in the absence of a request only when the phrase is "'used in a technical sense peculiar to the law.'" (*People v. Rowland* (1992) 4 Cal.4th 238, 270-271.)

The common dictionary definition of "imminent" is "ready to take place; . . . hanging threateningly over one's head." (Webster's New Collegiate Dict. (1979) p. 568, col. 1.) There is no functional difference between this definition and the requirement that the danger be "present, immediate and instantly dealt with." The definition of "imminent" used in the instructions clearly is not a legal term of art, but is a common, everyday term. Defendant's failure to request added detail therefore waives any claim of error on appeal.

Failure to Define "Great Bodily Injury"

Several instructions given the jury use the phrase "great bodily injury." Arguing that the phrase is a legal term of art which the court therefore had a duty to define sua sponte (*People v. Rowland, supra*, 4 Cal.4th at pp. 270-271), defendant contends the trial court erred prejudicially in failing to do so. It has long been settled that the phrase "great bodily injury" means a "'significant or substantial physical injury,'" as that phrase is commonly understood. (*People v. Kimbrel* (1981) 120 Cal.App.3d 869, 873, italics omitted.) The Supreme Court's opinion in *People v. Escobar* (1992) 3 Cal.4th 740 does not change that analysis. In *Escobar*, the court did not give the phrase "great bodily injury" a technical legal meaning, but rather discussed the sort of injury that is "'significant or substantial,'" noting how earlier appellate opinions had been led astray from the common understanding of the term. (*Id.* at pp. 745-750.) Inasmuch as the phrase "great bodily injury" has no technical legal meaning, defendant's failure to request a detailed definition waives any claim of error on appeal.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA J.

MASTERSON, J.

APPENDIX D

Order of August 19, 2003, denying rehearing en banc and suggestion for rehearing en banc

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANE BUTLER, WARDEN, Respondent-Appellant, v. BRIAN STINSON, Petitioner-Appellee.	No. 02-56193 D.C. No. CV-98-10546-FMC ORDER (Filed Aug. 19, 2003)

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing and the suggestion for rehearing en banc is denied.